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NO. 507

IN THE

Supreme Court of the United States

October Term, 1969

BAY SOUND TRANSPORTATION CO., et al.,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals For The Fifth Circuit

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For The Fifth Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Bay Sound Transportation Co., et al., pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered April 30, 1969.

OPINIONS BELOW

An opinion rendered by the United States District Court for the Southern District of Texas, Houston Division, is not officially reported. It is unofficially reported

at 67-2 USTC ¶9641. (It appears in the printed record on pages 1537-1614.)

The opinion of the Court of Appeals for the Fifth Circuit was entered on April 30, 1969. It has not yet been officially published. It is unofficially reported at 69-1 USTC ¶9371. (Petitioners' Motion for Rehearing was denied without opinion.)

JURISDICTION

The United States District Court had jurisdiction of this case under 28 U.S.C. §1291.

The judgment of the Court of Appeals was entered on April 30, 1969, and the order overruling the Appellants' Motion for Rehearing was entered on May 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. *Separate-Corporations Issue.* Whether, on the record, the taxpayer-corporations were created for "the principal purpose" of avoidance of federal income tax, under Section 269 of the Internal Revenue Code.

2. *Depreciation Issue.* Whether no depreciation write-off over a period of (a) less than 20 years for tugboat hulls, (b) less than 15 years for barge hulls, would have been "reasonable," within the meaning of Section 167 of the Internal Revenue Code.

STATUTES INVOLVED

The applicable statutes, Sections 167 and 269 of the Internal Revenue Code, are set out in the Appendix. *infra.*

STATEMENT OF THE CASE

1. *Separate Corporations ("Multiple-corporations") Issue.*

By an overwhelming preponderance of the evidence, and with no evidence to the contrary, the taxpayers showed that the "principal purpose" for the creation of the separate taxpayer-corporations was to limit liability, not to avoid taxes. The District Court, thinking that if tax avoidance was merely one purpose of forming the corporations their separate surtax exemptions must be disallowed, held for the Government under Section 1551 of the Internal Revenue Code. But Section 1551 was not applicable, as the Court of Appeals held. The Court of Appeals reversed and remanded to the District Court for it "to determine whether or not the findings of fact on the record are sufficient to disallow the exemptions of the surtax under Section 269."

It is our position that as a matter of law the record requires the conclusion that the "principal purpose" for forming the corporations was not tax avoidance. A contrary conclusion would be "clearly erroneous." *Southeastern Canteen Co. v. Commissioner*, (9th Cir., decided May 13, 1969), ___F.2d___ (69-1 USTC ¶9396), reversing the trial court and rendering final judgment on this issue.[1]

This is the strongest case for upholding the separate surtax exemptions of separate related corporations that we have run across.

---

1. See also, to the same effect (under a different statute), *W. Braun Co. v. Commissioner*, 396 F.2d 264 (2d Cir., 1968).

The taxpayer corporations' business consisted of transporting petroleum (a "live bomb"), in crowded waterways. One could compare it to driving a butane truck down a crowded highway without brakes.

As if this were not enough, the taxpayers were predominantly self-insured. Not to operate as separate corporations would seem foolhardy, from a strictly business standpoint, under such circumstances, because otherwise one accident by one vessel would have subjected the entire fleet to liability.

The evidence from many unrelated witnesses established that it is customary procedure in the industry to have separate corporations for the purpose of limiting exposure to liability.[2]

The taxpayers' attorneys advised that admiralty trends and awards were increasingly favoring claimants, and therefore that separate corporations should be formed to keep liability exposure within bounds.

There was no evidence to the contrary.

The District Court found that the principal individual connected with the taxpayers (Mr. C. W. Edwards) had been advised by admiralty attorneys to have separate corporations in order to isolate liability; before these separate corporations were formed. (Finding No. 54,

---

2. Indeed, for other industries too, separate surtax exemptions for related corporations seems to be the rule rather than the exception. A report of the Internal Revenue Service for the year 1964 shows that approximately 182,000 tax returns were filed by affiliated corporations in "controlled groups" and that the majority of these (104,000 corporations) elected separate surtax exemptions. See 26 Journal of Taxation 147 (March 1967). This rebuts any contention that recognition (for tax purposes) of the taxpayers as separate entities would give them unfair advantage over others.

citing Tr. 1137-38.) Also, in Finding No. 55, the trial court found that some of the taxpayer corporations and their vessels were not covered by personal-injury or property-damage insurance.

The District Court eroneously placed a "heavy" burden on the taxpayers,—the correct burden being the normal preponderance-of-the-evidence standard.

The District Court thought the amount of claims in relation to the amount of tax savings to be a relevant consideration. However, in listing claims (Finding No. 56), the District Court listed only claims against *barges*. Claims against the barges *and tugboats* totaled several millions of dollars. (See Appendix 0 to the "Brief for the Appellants" in the Fifth Circuit.) Moreover, the District Court erroneously assumed the amount of tax savings to be $110,000, whereas, in reality, that was only the maximum potential tax savings and the actual tax savings were shown to have been considerably less. Indeed, for the first taxable year involved (1957), the taxpayers suffered a net loss because of operating through more than one corporation, and the next two years their net over-all tax saving through separate corporations amounted to $16,632 in 1958 and $6,114 in 1959, according to later computations made by the taxpayers (see Appendix P of said Brief). Thus, the District Court was wrong in saying (R. 1590) that "the separate corporations resulted in a savings of about $110,000 per year." In 1959, out of the 20 corporations, only 7 had substantial income, while 10 had substantial losses.

In the instant case, the Government conceded that limiting liability may have been one of the purposes for having separate corporations.

The comparable case of *Tidewater Hulls, Inc. v. United States,* 68-1 USTC ¶9405 (E.D. La., 1968), was decided by the trial court against the Government, and the Government did not appeal. There the court held that, even if Section 1551 were applicable, the taxpayers had established that tax avoidance was not even a "major purpose," let alone the "principal purpose," of the formation of separate related corporations. That case is not nearly as strong a case for the taxpayers as the present one. That this is so was stated in the Government's own brief in the *Tidewater* case, which also reads in part as follows:

> the only evidence * * * [of tax avoidance in the *Bay Sound* case] was that the individuals involved were made aware of the tax consequences * * *.

The *Government* concluded in its brief in *Tidewater:*

> The absence of such evidence ["clear and express evidence" of "tax avoidance motives"] in *Bay Sound* undoubtedly prevented the application of Section 269.

2. *Depreciation Issue.*

The depreciation issue basically is whether the taxpayers' investments in their hulls, which are well battered and corroded within five to ten years, must be depreciated over ~~20~~ 15 years as to the barge hulls, and over ~~15~~ 10 years as to the tugboat hulls, as the courts below held, rather than over 10 or 12 years.

A thoroughgoing engineering study by the Government's own expert engineers (Ptlfs. Ex. 2) established that the correct reasonable period for depreciation was 10 to 12 years.

The precise issue, strictly speaking, is not how long a boat will live. The exact issue is not even necessarily "how long a hull will last," because factors such as obsolescence, inflation, business uncertainty and other reasons may indicate that a higher rate of depreciation is reasonable. Actually, where there is any substantial doubt at all, a depreciation rate should not be considered unreasonable where it does not substantially distort a true reflection of income. Thus, a depreciation write-off for machinery and equipment spread over 5 years should in most cases be all right,[3] and here the taxpayers are asking for a period twice that long.

This is so because reasonableness is the sole statutory standard. A "reasonable" allowance for depreciation is one that is "just, fair and equitable." 4 Mertens, Law of Federal Income Taxation (Rev.), Sec. 23.17.

Thus, the issue is simple. Even so, the Government and the courts below "missed the boat" in this respect in failing to recognize that "if each part [of a machine] is replaced as it wears out, at some point a new machine must be said to have replaced the original."[4]

Here the probable life of the hulls was so short that financial institutions would not lend money on the security of such equipment for more than 3 to 5 years.

Errors of law of courts below. The District Court fell into error because of the various arguments put forth by the Government.

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3. Cf. Report of the [Canadian] Royal Commission on Taxation (the Carter Report), Vol. 4, pp. 238-240 (1966).

4. Note, Amortization of Intangibles: An Examination of the Tax Treatment of Purchased Goodwill, 81 Harv. L. Rev. 859, 875 (Feb. 1968).

For example, the District Court used hindsight in its determination. Its findings of fact go into great detail as to the ages of various vessels as of the time of trial, 1966, approximately 8 years after most of the vessels involved were built.[5] In the very recent case of *Western Terminal Co. v. United States* (9th Cir., decided May 29, 1969), ____F.2d____ (69-2 USTC ¶9446), it was held—with the Government's concurrence—that "hindsight" is not to be used in determining depreciation controversies.

There the court requested and received a letter from the Government's counsel to such effect, which reads in part as follows:

> *It is now the view of the Internal Revenue Service that "hindsight" should not be used in the resolution of depreciation cases.* Treasury Regulations on Income Tax (1954 Code), Section 1.167(b)-0-(a) provides:
>
> * * * The reasonableness of any claim for depreciation shall be determined upon the basis of conditions known to exist at the end of the period for which the return is made. * * *
>
> See also, *Johnson v. Commissioner* (62-1 USTC ¶9450), 302 F.2d 86 (C.A. 4th, 1962), certiorari denied, 371 U.S. 904. *The Service's current position*

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5. For example, most of the depreciation fact findings rely on hindsight. The depreciation findings (Nos. 1-21c) cover 20 pages (pp. 5421-41) in 20 AFTR 2d. The court's reliance on hindsight is evident in the majority of these pages. In Finding No. 3 (20 AFTR 2d, p. 5421), the District Court notes that: *"By date of trial* six vessels had been disposed of" [emphasis added.] On the next page (p. 5422), the "Age at Date of Trial of these cases" is shown in the next-to-last column of a table. So also, in regard to the vessels in suit, Finding No. 10 and the table on page 5428 reflect hindsight. See also Findings 19-20, which cover ten pages (5430-40), and Findings 21b and 21c (p. 5441) at the end of the depreciation findings.

is consistent with the foregoing Regulation and its cited opinion. [Emphasis added.]

This suggests that this case at least should be remanded to the Fifth Circuit for reconsideration, in light of this recent concession by the Government.

The Government also led the District Court into error by placing heavy reliance on past history, contrary to the policy statement of the Secretary of the Treasury (Dillon) in 1962 that "The rate of depreciation * * * will not be tied to past history." (Pltfs. Ex. 2, p. 9, R. 1474.)

A Short History of Our Depreciation Law

In the early years of the income tax law the depreciation rules were extremely simple. The Government assumed that a businessman could best judge how long his machinery and equipment would be useful. The depreciation period generally was left up to the businessman to determine for himself, as long as he was consistent.

Things went smoothly until 1934. Then, by administrative action only, the Treasury Department, in an attempt, not to collect more revenue, but to collect it faster, began to press for lower depreciation rates.

At first, the Treasury merely required businessmen to prove that their depreciation rates were realistic. But in 1942 it completed the onerous task of setting down "realistic" rates for just about everything—mirrors, bookcases, rescue helmets and water coolers, as well as more vital factory equipment.

These rates were not compulsory. A businessman could try to negotiate with the Treasury Department for another

rate. But most smaller companies allowed the Treasury to call the tune.

Hardly anyone was pleased with the situation. In the post-World War II years the pace of technology's advance accelerated. Equipment that might not wear out for 15 years could easily become obsolete in seven.

In 1962 the Kennedy Administration took the complaints into account and eased the depreciation rules somewhat. Furthermore, it simplified things considerably; industrial equipment was grouped into various categories instead of being listed item-by-item.

A faster write-off reduces current taxes. Yet if a taxpayer continues to use the equipment his tax payments in later years will rise to make up the difference. And if he sells a fully depreciated machine he will have to pay ordinary-income taxes on the full sale price. So, since 1962, there is no tax variation. (See footnote 60, page 77, of our main brief in the Fifth Circuit.)

The importance of this case lies in the fact that the decision of the courts below is contrary to (1) the view of the Supreme Court and (2) the Government's own present policy, as the following discussion shows:

(1) *The Supreme Court's view.* In the U. S. Supreme Court's decision in the case of *United States v. Ludey*, 274 U.S. 295, 302, 71 L.Ed. 1054, 47 S.Ct. 608, 610 (1927), and subsequent cases, it was established that only a "rough estimate" is required for depreciation or cost-depletion purposes. This makes good sense because there figures to be no difference at all, tax-dollar-wise, whether depreciation is spread over a long or a short period.

(2) *National Treasury Department Policy.* The courts below gave no consideration to the fact that national Treasury Department policy supports the taxpayers' position: See e.g., Rev. Rul. 90, 1953-1 Cum. Bull. 43 (Appellants' Brief, Appendix A, at pp. 9-10). National Treasury policy supports the taxpayers because such policy supports:

a. generally not disturbing a taxpayer's depreciation (since "there may be reasonable differences of informed judgment," *ibid.*); and

b. depreciation over a reasonably short period (*ibid.*; see also T.I.R. No. 517 and Introduction to Rev. Proc. 62-21, Appellants' Brief, Appendix A, pp. 11-16).

The national office of the Treasury Department and the Internal Revenue Service recognize that there is no tax-dollar loss to the Treasury in this approach, but that, if it is not followed, modernization is seriously discouraged. This is a highly important fact. And its discriminatory effect here is patent.

Indeed, the Internal Revenue Service in 1966 amended its 1962 guidelines so as to specify a depreciation write-off over 12 years for floating oil barges used in offshore operations.[6] In this case some of the taxpayers' oil barges were used offshore, and in any event the undisputed evidence established that their inshore operations in narrow, shallow, winding channels were, if anything, harder on their hulls than offshore operations were. The record in this

6. Rev. Proc. 66-18, 1966-1 Cum. Bull. 646 (P. 16 of App. A of Appellants' Brief in 5th Cir.)

case reveals that depreciation periods of 10 years (or less) for comparable equipment are generally used by other operators in the Gulf Coast area (R. 1432), and it is now a matter of record that depreciation of such vessels over a 10-year period was sanctioned recently by the Internal Revenue Service, which "agreed that the method of depreciation urged by [the taxpayer—i.e., 10 years] * * * is approprate."[7] These taxpayers cannot effectively compete if they are discriminated against.

The Effect of Inflation

Actually, from the standpoint of economic reality, it is a fact—really incontestable—that inflation alone justifies the taxpayers' claim for a ten-year write-off.

We have had the federal income tax for over 50 years. Inflation has been continuously on the upswing for 30 years. The value of a dollar today is less than half what it was 20 years ago. We know of no authority for the proposition that inflation can never be considered for any taxing purposes. Inflation should not be ignored for purposes of determining reasonable depreciation for property held a decade or two. For the result of ignoring inflation will be that a tax supposedly on net profit is imposed instead on capital cost. This produces a discriminatory inequity. The inflation issue should not have been swept under the rug.

Quantum of Proof Required

The courts below erroneously failed to consider the factor of obsolescence—contrary to the law, the Regu-

7. *Tidewater Hulls, Inc. v. United States*, 68-1 USTC ¶9405 (E.D. La., 1968), *supra* (footnote 1 of opinion).

lations, national Treasury policy, and the evidence in this case. In *Burnet v. Niagra Falls Brewing Co.*, 282 U.S. 648, 655, 51 S.Ct. 262, 265, 75 L.Ed. 594, 598 (1931), the Supreme Court held:

> It would be unreasonable * * * to put upon the taxpayer the burden of proving to a reasonable certainty the existence and the amount of obsolescence. *Such weight of evidence as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money fairly may be deemed sufficient.* * * * A reasonable approximation of * * * * * * [of obsolescence or wear and tear] * * * is all that is required. [Emphasis added.]

To require a higher standard of proof than a "rough estimate," fairly made, would be contrary to the Court's decision in *Ludey*, bad law, bad economics, contrary to present Treasury Department policy, and discriminatory.

REASONS FOR GRANTING THE WRIT

Preliminary Statement. We are concerned with two issues, a depreciation issue and a separate-corporations issue. A final decision has not been reached on the separate-corporations issue, pursuant to the Court of Appeals' reversal and remand to the trial court. Thus, this Court may well deem our petition premature as to the separate-corporations issue. Accordingly, this discussion will emphasize the importance of the depreciation issue.

The Supreme Court exists primarily to give a uniform and national interpretation to the constitution and the national laws. Here it seems that we may have a conflict between the courts, on the one hand, and the Treasury Department and perhaps Congress, on the other hand.

The issues presented are of broad, general importance.

To uphold the courts below on the depreciation issue will seriously and adversely affect the nation's entire economy. Repeal of the 7% investment credit now is probably wise because it represents an outright subsidy for capital-goods expansion, and the economy is presently overheated. But we should not go all the way to the other extreme, as the lower courts' decision would do. It really should not matter much whether depreciation is taken over a long term or a short term, as long as it does not result in a substantial distortion of the annual income picture. In this connection, a five-year spread ought to be sufficient as indeed it has been in the eyes of Congress when Congress has seen fit to provide for a depreciation span for capital expenditures that may have a much longer life.[8] Requiring too-long depreciation obviously discourages not merely expansion, but even the capital-goods spending necessary just to keep one's equipment safe and competitive. It discourages investment and modernization, and jeopardizes efficiency. To decide this issue in favor of the taxpayers can mean no loss in revenue and can hurt no one. To let the decisions of the lower courts stand will seriously hurt the nation's entire economy.

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8. The Government itself, when it has had occasion to authorize amortization or depreciation of an asset that actually has an unlimited life, has considered a 5-year spread as sufficient to avoid income distortion. See, for example: (1) Sec. 248 of the Revenue Code, which authorizes depreciation or "amortization" of corporate-organization expenses over a minimum period of 5 years; (2) Sec. 174(b), dealing with research and experimental expenditures, which provides that, if not currently deducted under Section 174(a), a taxpayer may elect to depreciate or amortize such expenditures over a period of 5 or more years, and (3) Sec. 177, containing a similar optional 5-year minimum depreciation (amortization) provision for trademark and trade name expenditures.

The decision of the courts below is contrary to the present national policy of the Treasury Department and the Internal Revenue Service, which favors giving taxpayers a presumptively free hand to set new, shorter-term depreciation rates—until such future time as they have proven wrong.

And the decision of the lower courts contravenes the decisions of this Court in *United States v. Ludey* and *Burnet v. Niagra Falls Brewing Co., supra.*

At issue is our whole approach to depreciation of personal property. Certiorari should be granted. Our economy is at stake.

CONCLUSION

For the reasons set forth, this petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari have been served on the United States by airmailing, with postage prepaid, on this the ____ day of August, 1969, the same to the following:

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APPENDIX

Statutes Involved

Internal Revenue Code of 1954:

Section 167. *Depreciation.*

(a) *General Rule.* There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

(b) *Use of Certain Methods and Rates.* For taxable years ending after December 31, 1953, the term "reasonable allowance" as used in subsection (a) shall include (but shall not be limited to) an allowance computed in accordance with regulations prescribed by the Secretary or his delegate, under any of the following methods:

(1) the straight line method.

(2) the declining balance method, using a rate not exceeding twice the rate which, when added to all allowances for the period commencing with the taxpayer's use of the property and including the taxable year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used had such allowances been computed under the method described in paragraph (2).

Nothing in this subsection shall be construed to limit or reduce an allowance otherwise allowable under subsection (a).

(c) *Limitations on Use of Certain Methods and Rates.* Paragraphs (2) (3), and (4) of subsection

(b) shall apply only in the case of property (other than intangible property) described in subsection (a) with a useful life of 3 years or more * * *

(d) *Agreement as to Useful Life on Which Depreciation Rate is Based.* Where, under regulations prescribed by the Secretary or his delegate, the taxpayer and the Secretary or his delegate have, after the date of enactment of this title, entered into an agreement in writing specifically dealing with the useful life and rate of depreciation of any property, the rate so agreed upon shall be binding on both the taxpayer and the Secretary in the absence of facts or circumstances not taken into consideration in the adoption of such agreement. The responsibility of establishing the existence of such facts and circumstances shall rest with the party initiating the modification. Any change in the agreed rate and useful life specified in the agreement shall not be effective for taxable years before the taxable year in which notice in writing by certified mail or registered mail is served by the party to the agreement initiating such change.

Section 269. *Acquisitions Made to Evade or Avoid Income Tax.*

(a) *In General.*—if—

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the

hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation,

and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then the Secretary or his delegate may disallow such deduction, credit, or other allowance. For purposes of paragraphs (1) and (2), control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation. * * *

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Opinions of United States Court of Appeals for the Fifth Circuit and United States District Court (S.D. Tex.)

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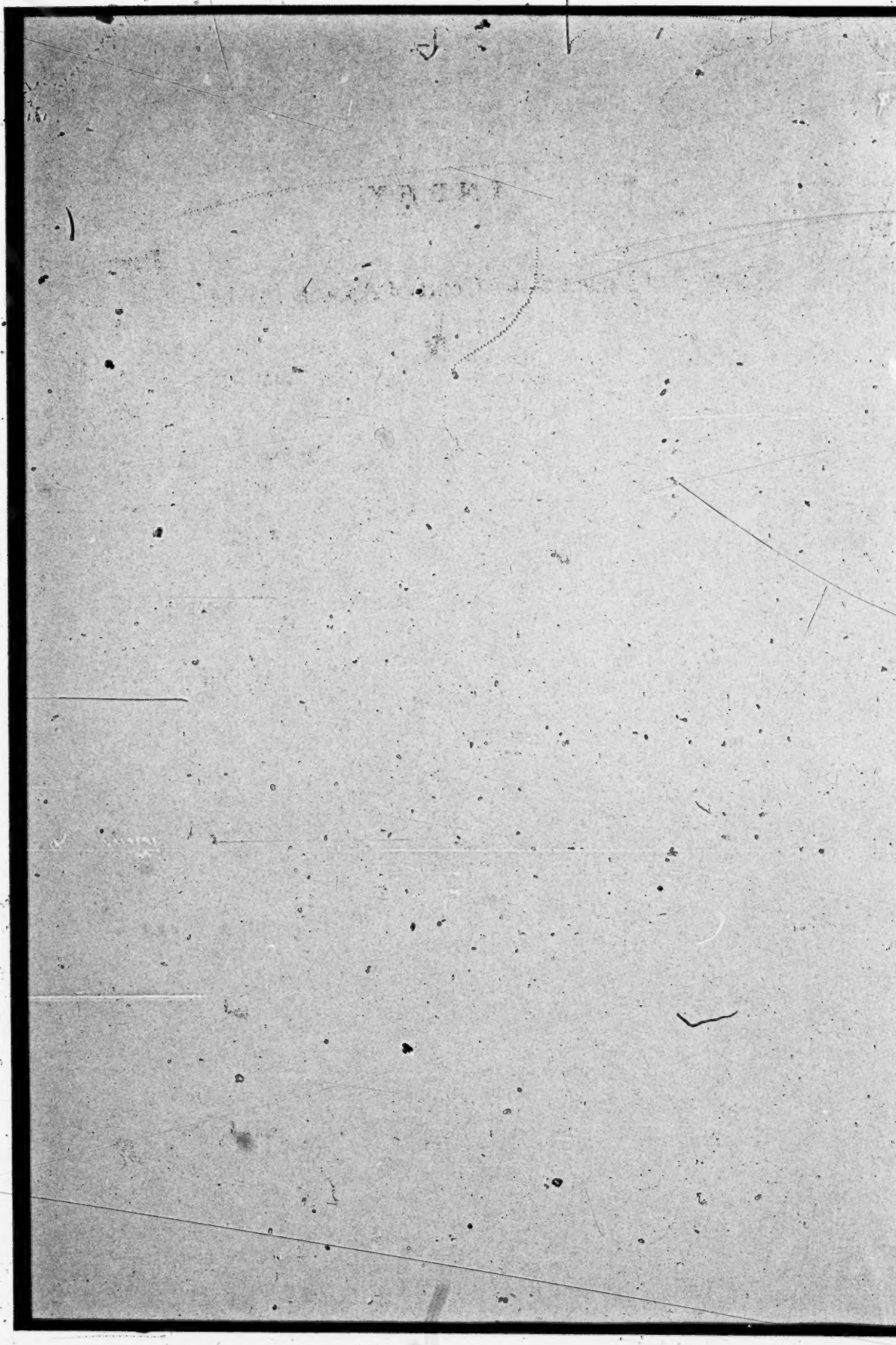

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ADDENDUM TO PETITION FOR WRIT OF CERTIORARI To The United States Court Of Appeals For The Fifth Circuit

Opinions of United States Court of Appeals for the Fifth Circuit and United States District Court (S.D. Tex.)

OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Before GOLDBERG and MORGAN, Circuit Judges, and LIEB, District Judge.

MORGAN, Circuit Judge: These related income tax refund actions were consolidated and tried before the District Court [67-2 USTC ¶9641] sitting without a jury. This appeal by the taxpayers is taken from portions of twenty-

six (26) judgments of the District Court. The three issues presented to this Court are:

1. Whether the taxpayers' estimated useful lives of certain vessels were "reasonable" in claiming a depreciation allowance. Section 167 of the Internal Revenue Code of 1954.

2. Whether taxpayer C. W. Edwards is entitled to deduct claimed business entertainment expenses in the absence of any record evidence under Section 162 of the Internal Revenue Code of 1954.

3. Whether the "principal" or "major" purpose for the formation of multiple corporations was tax avoidance. Sections 269 and 1551 of the Internal Revenue Code of 1954.

C. W. Edwards is the prime founder and still operates to a large extent a number of partnerships and corporations engaged in the business of hauling crude oil and distillate in the Louisiana and Texas coastal areas.

Edwards Transportation Company is the parent organization. It is a partnership set up in the early 1930's by C. W. Edwards and another individual, now deceased. In 1939, Edwards organized his first corporation, Barge Transport Company, for the benefit of his son, Keith Edwards. From its inception, Barge Transport Company has conducted its business within the framework of the entire Edwards organization. At the time of the trial in the court below Edwards was in his 70th year.

In 1955, it was decided that each newly acquired towboat, pushboat, and barge should be owned and operated by separate corporations. Accordingly, by June, 1966, the time of the trial below, nineteen separate business

organizations—one partnership and eighteen corporations —each owned one of the nineteen new vessels.

The Commissioner of Internal Revenue disallowed the surtax exemptions of the corporate taxpayers under Section 269[1] of the Internal Revenue Code, contending that

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[1] *Section 269, Internal Revenue Code of 1954:*

SEC. 269. ACQUISITIONS MADE TO EVADE OR AVOID INCOME TAX.

(a) *In General.*—If—

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation, and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then the Secretary or his delegate may disallow such deduction, credit, or other allowance. For purposes of paragraphs (1) and (2), control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation.

(b) *Power of Secretary or His Delegate To Allow Deduction, etc., in Part.*—In any case to which subsection (a) applies the Secretary or his delegate is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

the several corporations were formed for the "principal purpose" of tax avoidance. Taxpayers contend that the principal purpose for creating multiple corporations was to limit the liability of the Edwards enterprise. They allege several other purposes for incorporating multiple businesses, and assert that tax considerations took a minor role.

The District Court, following a non-jury trial of the case, found that the entire enterprise should be treated as a single business entity, rather than as separate corporations. Although the Court did not specifically so state, it bottomed its opinion of Section 1551 of the Code.[2] It did not rely on Section 269, as was urged by the Commissioner.

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[2] *Section 1551, Internal Revenue Code of 1954:*

SEC. 1551. [Prior to its amendment by the Revenue Act of 1964]. DISALLOWANCE OF SURTAX EXEMPTION AND ACCUMULATED EARNINGS CREDIT.

If any corporation transfers * * * all or part of its property (other than money) to another corporation which was created for the purpose of acquiring such property or was not actively engaged in business at the time of such acquisition, and if, after such transfer the transferor corporation or its stockholders, or both, are in control of such transferee corporation during any part of the taxable year of such transferee corporation, then such transferee corporation shall not for such taxable year (except as may be otherwise determined under section 269(b)) be allowed either the $25,000 exemption from surtax provided in section 11(c), or the * * * accumulated earnings credit provided in * * * section 535(c), unless such transferee corporation shall establish by the clear preponderance of the evidence that the securing of such exemption or credit was not a major purpose of such transfer. For purposes of this section, control means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of the corporation. In determining the ownership * * *, the ownership of stock shall be determined in accordance with the provisions of section 544, except that constructive ownership under section 544(a)(2) shall be determined only with respect to the individual's spouse and minor children. * * *

In the late 1950's and during the taxable years 1957 to 1960, the corporate taxpayers estimated the probable useful lives of their newly built vessels for depreciation purposes pursuant to Section 176(a) of the Code.[3] The criterion is that the estimation must be "reasonable." The taxpayers estimated the useful lives of the vessels to be seven years. The Commissioner maintained at trial that the barges had a useful life of twenty-five years, and the tugboats thirty-five years. The Court below found that the tugs had a useful life of twenty years, except that the useful lives of four tugs was fifteen years. The Court also found that the barges had a useful life of fifteen years.

Taxpayers object vigorously that the Commissioner and the District Court erred in gauging useful life on the basis of depreciation history of those vessels which were constructed prior to 1955. The lower court in fact found that the taxpayers' actual past experience was to retire few pre-1955 vessels from service.

Alternatively, taxpayers argue that the trial court should have applied the doctrine of equitable estoppel because of alleged statements by certain Internal Revenue agents to officials of the taxpayers shortly before 1957 that the useful lives of seven years would be a criterion acceptable to the Internal Revenue Service. The Court gave little weight to taxpayers' proof on this point and held, in any

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[3] *Section 167(a), Internal Revenue Code of 1954:*

SEC. 167. DEPRECIATION.

(a) *General Rule.*—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)

(1) or property used in the trade or business, or

(2) of property held for the production of income.

event, that such statements would not be binding on the Government.

A report on the depreciable lives of the vessels was prepared by the Internal Revenue Service Valuation Analysis Branch. The report favored the taxpayers' position. The Government repudiated the report, and the trial Court gave little weight to the report. The taxpayers assert that the report was entitled to "considerable weight."

C. W. Edwards, individually, claimed business entertainment expense deductions of several thousands of dollars for the years 1958 and 1959. The Commissioner disallowed the claims for the reason that Edwards failed to prove the expenditures. Edwards regularly cashed $300.00 checks for these expenses and kept the cash in his hip pocket, separate from his front pocket where he kept his personal funds. The District Court approved the Commissioner's ruling, stating that the claimed expenditures were not substantiated by sufficient evidence. Edwards argues that records of expenses were not required during the taxable years in question.

Alternatively, it is argued that the trial Court should have employed the *"Cohan* rule" to allow a reasonable approximation of the expenditures claimed by Edwards. The Government retorts that the rule is inapplicable where no clear evidence of any amount spent is advanced by the taxpayer.

Section 167(a) of the Code authorizes the taxpayer to arrive at a "reasonable allowance" for depreciation. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan, so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated

useful life of the depreciable property, equal the cost or other basis of the property. See Treasury Regulation §1.167(a)-1(a).[4]

Salvage values are not involved on this appeal.

The useful life of an asset is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. See Treasury Regulation §167(a)-1(b).[5]

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[4] *Treasury Regulations on Income Tax* (1954 Code):
Sec. 1.167(a)-1. *Depreciation in general.*
(a) *Reasonable allowance.* Section 167(a) provides that a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business or of property held by the taxpayer for the production of income shall be allowed as a depreciation deduction. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amount set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property as provided in section 167(g) and §1.167(g)-1. An asset shall not be depreciated below a reasonable salvage value under any method of computing depreciation. However, see section 167(f) and §1.167(f)-1 for rules which permit a reduction in the amount of salvage value to be taken into account for certain personal property acquired after October 16, 1962. See also paragraph (c) of this section for definition of salvage. The allowance shall not reflect amounts representing a mere reduction in market value. See section 179 and §1.179-1 for a further description of the term "reasonable allowance".

[5] *Treasury Regulations on Income Tax* (1954 Code):
Sec. 1.167(a)-1. *Depreciation in general.*
(b) *Useful life.* For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probably future developments. Some of the factors to be considered in determining this period are (1) wear and tear and decay or decline from natural causes, (2) the normal progress of the

A study of Treas. Reg. §1.167(a)-1(b) makes clear that the taxpayer's past experience is but one of several factors to be considered when estimating the useful life of an asset. In addition to the taxpayer's past experience with similar property, "present conditions and probable future developments" must be taken into account.

The taxpayers maintain that the District Court ignored evidence which showed several other relevant factors besides past experience. Apparently, the trial Court relied heavily on the useful life experience of the Edwards organization with respect to the vessels constructed prior to 1955. However, the District Court's findings examine in detail other significant factors, such as the thickness and quality of the steel hulls, changes in design of the vessels, etc.

The report of the Valuation Analysis Branch of the Internal Revenue Service recommended that depreciation deductions for the vessels should be based on useful lives of ten to twelve years. The Commissioner insists that he never adopted the report and that, contrary to the tax-

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art, economic changes, inventions, and current developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's trade or business, and (4) the taxpayer's policy as to repairs, renewals, and replacements. Salvage value is not a factor for the purpose of determining useful life. If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination. The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary regardless of the method of computing depreciation. However, estimated remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination. For rules covering agreements with respect to useful life, see section 167(d) and §1.167(d)-1.

payers' position, he should not be bound by the suggestions of the report. The trial Court originally excluded the report because it was ruled hearsay. Later, in its memorandum opinion, the Court admitted it as a business record exception to the hearsay rule, on the authority of *Brooks v. Texas General Indemnity Co.*, 251 F.2d 15, 16 (5 Cir., 1958). It is readily apparent from the District Court's opinion, however, that, as the trier of fact, he did not give the report much evidential weight.

Taxpayers argue that the Internal Revenue Service report was deserving of substantial and perhaps controlling weight. On the other hand, it seems proper that the District Court, as the finder of fact, should be allowed to give the expert opinion in the report such credence as he deems appropriate under all the circumstances of the case. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944).

The taxpayers assert that the Commissioner should be equitably estopped to deny the seven-year useful life estimate because of the alleged assurances of the local Internal Revenue officials that such a period would be acceptable. The evidence is contradictory concerning the granting of such an assurance. In any event, the trial Court found that at most the conversation applied to only one vessel, the pushboat *Letha C.*

In 1956, nine months prior to the alleged conversation, a new Treasury regulation, §1.167(d)-1,[6] was promul-

[6] *Treasury Regulations on Income Tax* (1954 Code):

Sec. 1.167(d)-1. *Agreement as to Useful Life and Rates of Depreciation.*

After August 16, 1954, a taxpayer may, for taxable years ending after December 31, 1953, enter into an agreement with respect to the estimated useful life, method and rate of depreciation, and treat-

gated. The regulation provides for a method of concluding a formal agreement with the Government on the question of useful life for future depreciation. Assuming that a seven-year useful life was approved by the Internal Revenue agents, it was not arrived at in accordance with the requirements of Treasury Regulation §1.167(d)-1. Any statement made concerning useful life would be unauthorized.

It is the lack of authority in the agents that is critical. Assuming that the alleged assurances were given by the agents, the statements were unauthorized and the Government will not be estopped by the unauthorized statements of its agents. *Sanders v. Commissioner* [55-2 USTC ¶9636], 225 F.2d 629 634 (10 Cir. 1955), cert. den. 350 U. S. 967 (1956). The case of *Simmons v. United States* [62-2 USTC ¶15,449], 308 F.2d 938 (5 Cir., 1962), and the cases cited therein, do not appear to be applicable. In those cases there existed no controversy over the fact that the crucial statements were made and that the statements were authorized. Such are not the facts in the instant case.

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ment of salvage of any property which is subject to the allowance for depreciation. An application for such agreement may be made to the district director of internal revenue for the district in which the taxpayer's return is required to be filed. Such application shall be filed in quadruplicate and shall contain in such detail as may be practical the following information.

(a) * * *
(b) * * *
(c) * * *
(d) * * *
(e) * * *
(f) * * *

The agreement must be in writing and must be signed by the taxpayer and by the district director.

The remaining grounds urged by the taxpayers on the depreciation issue appear to be without merit.

We hold that the findings of the District Court on the depreciation issue were not "clearly erroneous" and that the Court should be affirmed on this issue. See *Commissioner v. Duberstein* [60-2 USTC ¶9515], 363 U. S. 278, 291 (1960).

On the business entertainment expense issue, C. W. Edwards kept no records whatsoever of the claimed expenditures for business entertainment. Even prior to the 1962 enactment of Section 274(d) of the 1954 Code,[7] this Court required the taxpayer to demonstrate "with some substantiality" the extent of his personal obligation for entertainment expense. *Williams v. United States* [57-2 USTC ¶9759], 245 F.2d 559, 560 (5 Cir., 1957).

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[7] *Sec. 274(d), Internal Revenue Code of 1954:*

SEC. 274. DISALLOWANCE OF CERTAIN ENTERTAINMENT, ETC., EXPENSES.

(d) *Substantiation Required.*—No deduction shall be allowed—(1) under section 162 or 212 for any travelling expense (including meals and lodging while away from home), (2) for any item with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such an activity, or

(3) for any expense for gifts,

unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating his own statement (A) the amount of such expense or other item, (B) the time and place of travel, entertainment, amusement, recreation, or use of the facility, or the date and description of the gift, (C) the business purpose of the expense or other item, and (D) the business relationship to the taxpayer of persons entertained, using the facility, or receiving the gift. The Secretary or his delegate may by regulations provide that some or all of the requirements of the preceding sentence shall not apply in the case of an expense which does not exceed an amount prescribed pursuant to such regulations.

The record fails to reveal that Mr. Edwards proved even a portion of his expenses to be deductible. This fact renders futile a court's effort to determine that at least a given amount was actually spent or incurred as an entertainment expense. *Mayrath v. Commissioner* [66-1 USTC ¶9250], 357 F.2d 209, 214 (5 Cir., 1966). The rule in *Cohan v. Commissioner* [2 USTC ¶489], 39 F.2d 540 (2 Cir., 1930), is inapposite under the circumstances of this case.

On the multiple corporate issue, although the District Court did not specifically so hold, it is evident from reading the lower Court's memorandum opinion that the Court relied on Section 1551 of the Code instead of Section 296(a), as was urged by the Commissioner in denying the taxpayers' separate surtax exemptions.

Section 1551 is explicit in its requirement that the transferor of property to the newly established transferee corporate body must itself be a corporation. If the transferor was not a corporation, then Section 1551 is inapplicable. The Commissioner maintains that the transferor was Barge Transport Company, a corporation; that it was Barge Transport Company which transferred the newly constructed vehicles to the new corporations. The Commissioner urges that this Court hold that such a finding is implicit in the lower Court's memorandum opinion, even though the lower Court did not make that finding.

An examination of the entire record has failed to reveal any evidence that Barge Transport Company, or any other corporation, transferred the vessels to the new corporations so as to bring these various corporations within the purview of Section 1551.

The Commissioner contends that each of the 18 corporations to which Section 1551 applies was acquired in essentially the same manner. The decision to construct the vessel was made by C. W. Edwards, the vice president of the Barge Transport Company, the original corporation, after consulting with his son, Keith Edwards, the president, Jack Redding, the secretary and treasurer, of Barge Transport Company, and others. While the vessel was under construction, and about the time for delivery thereof, financing of the cost would be arranged. After the decision to construct each vessel was made, and the order therefor was placed with the company doing the construction work, a new corporation was organized to receive the vessel when completed. All property rights that existed in the vessel were acquired by the new corporation, and when and as the vessel was completed and delivered the new corporation took title. Each corporation acquired only one vessel. The above-summarized evidence is insufficient to support the conclusion that there was a transfer of property from Barge Transport Company to the newly acquired corporations.

The surtax exemptions here in question were not properly disallowed under the provisions of Section 1551. However, the Government contends that, if the Court does not agree that the record will support no finding other than that tax avoidance was the principal purpose of the transactions in question, the case should be remanded to the District Court for additional findings as to the applicability of Section 269. We agree that if Section 1551 is not applicable that this Court should direct that the case be remanded for the District Court to determine if Section 269 is applicable to these transactions and also to the

transfers of the vessels *CT&J* and *Toni Ann.*[8]

As its title denotes, Section 269 is designed to prevent "acquisitions made to evade or avoid income tax." However, the section is applicable only in certain carefully circumscribed situations—it may be invoked only where there has been an acquisition of control, the *principal purpose* of which is evasion or avoidance of taxes.

Section 269 provides that if any person acquires control of a corporation and the principal purpose of this acquisition is evasion of income taxes by securing the benefit of a deduction, credit, or other allowance, which he would not otherwise enjoy, then the deduction credit or allowance may be disallowed. The determination of the taxpayer's principal purpose in incorporation is a question of fact that depends upon the intent of the taxpayer at the time he acquires control of the corporation. See *Airport Grove Corp. of Polk County, et al. v. United States of America,* 5 Cir., 1969 [69-1 USTC ¶9267] —F.2d — [No. 25701, March 11, 1969]. The taxpayer has the burden of proving that control was not acquired for the unlawful purpose. *American Pipe & Steel Corp. v. Commissioner* [57-1 USTC ¶9590], 343 F.2d 125 (9 Cir., 1957).

The District Court did not make findings on the question of taxpayers' "principal purpose" under Section 269(a). The issue of "principal purpose" is one of fact. For this Court to hold that the "principal purpose" of these transactions was "evasion or avoidance of federal income tax," when the Court below failed to consider this

[8] These two vessels were transferred to Bay Sound Transportation Company and Riverside Transportation Company from Louisiana Transportation Company, a partnership.

matter, and when the facts might suggest a contrary conclusion under Section 269, would be wholly inappropriate. In cases tried without a jury, Federal Rules of Civil Procedure 52(a) directs the District Court to determine the essential facts upon which it bases its judgment; where the trial Court fails to do so, this Court cannot make such findings of fact. *S. S. Silberblatt, Inc. v. United States ex rel. Lambert Corp.*, 353 F.2d 545, 549-550 (5 Cir., 1965).

The findings and conclusions of the District Court are AFFIRMED on the issues disallowing taxpayers' claimed depreciation and entertainment expenses.

We disagree with the disallowance of the surtax exemptions under Section 1551 and REMAND the case to the District Court to determine whether or not the findings of fact on the record are sufficient to disallow the exemptions of the surtax under Section 269.

AFFIRMED in part; REVERSED and REMANDED in part for further proceedings not inconsistent herewith.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 25,729

D. C. Docket Nos. CA 63-H-73, 75 thru 99
& 66-H-462

BAY SOUND TRANSPORTATION COMPANY, ET AL., *Appellants,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Texas

Before GOLDBERG and MORGAN, Circuit Judges, and LIEB, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, and reversed and remanded in part for further proceedings not inconsistent with the opinion of this Court;

It is further ordered that appellants be condemned to pay one-half of the costs in this Court, and appellee be condemned to pay one-half of said costs.

April 30, 1969

Issued as Mandate: June 13, 1969

ORDER AMENDING JUDGMENT

It is now hereby ORDERED and ADJUDGED by this Court that the prior judgment in the above-styled action, dated April 30, 1969, be amended as to the assessment of costs as follows:

The appellee is condemned to pay one-half of the costs to the extent expressly permitted by law, 28 U.S.C.A. § 2412(a). (The 1966 amendment to this statute not being applicable in that this action was filed before July 18, 1966, *Allen v. Rachal,* D.C. Tex., 1967, 283 F. Supp. 986). Appellant is condemned to pay all remaining costs.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25729

BAY SOUND TRANSPORTATION COMPANY, ET AL., *Appellants,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Texas

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(Filed May 30, 1969)

ON PETITION FOR REHEARING

Before GOLDBERG and MORGAN, Circuit Judges, and LIEB, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

OPINION OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(Filed August 30, 1967)

(Caption Omitted)

[¶9641] Bay Sound Transportation Co. v. United States of America. Coastal Transportation Co. v. United States of America. The Christine Towing Co. v. United States of America. Riverside Transportation Co. v. United States of America. Murray Bay Transportation Co. v. United States of America. Dixon Bay Transportation Co. v. United States of America. Green Bay Transportation Co. v. United States of America. Erie Barge Co. v. United States of America. Ev Barge Co. v. United States of America. Gulf Storage Company, Inc. v. United States of America. Lavaca Barge Co. v. United States of America. Naphtha Barge Co. v. United States of America. Navidad Barge Co. v. United States of America. Wolverine Barge Co. v. United States of America. Huron Barge Co. v. United States of America. Michigan Barge Co. v. United States of America. Superior Barge Co. v. United States of America. Ontario Barge Co. v. United States of America. St. Clair Barge Co. v. United States of America. Jack Barge Co. v. United States of America. C. W. Edwards & Letha C. Edwards v. United States of America. Keith S. Edwards & Mary Edwards v. United States of America. John E. Redding & Violet Redding v. United States of America. Everett L. Meley, Jr. & Helen D. Meley v. United States of America. Maurice H. Hoffman & Lurline M. Hoffman v. United States of America. J. E. Redding, Trustee of the Shirley & Garland Fielder Trust, & Garland W. Fielder v. United States of America. William N. Blair & Glynn Blair v. United States of America.

U. S. District Court, So. Dist. Tex., Houston Div., CA's. 63-H-73, 63-H-75-63-H-99, 63-H-462, 8/30/67.

Memorandum Opinion

Hannay, District Judge: These suits are for the recovery of claimed overpayment of income taxes and interest paid under protest by the various plaintiffs together with statutory interest; the names of the various plaintiffs, the taxable years involved in the various suits, and the aggregate amounts involved are as follows:

Plaintiff	Taxable years ending	Amount
Bay Sound Transportation Co.	2-29-60	$ 6,889.39
Coastal Transportation Co.	11-30-57/58/59	18,759.38
The Christine Towing Co.	1-31-59/60	19,074.09
Riverside Transportation Co.	11-30-59	7,444.25
Murray Bay Transportation Co.	3-31-60	8,441.99
Dixon Bay Transportation Co.	4-30-60	9,244.96
Green Bay Transportation Co.	7-31-59/60	17,615.73
Erie Barge Co.	2-28-59/60	4,134.23
Ev Barge Co.	12-31-58/59/60	22,018.87
Gulf Storage Co., Inc.	9-30-59/60	6,030.35
Lavaca Barge Co.	11-30-59/60	11,335.52
Naptha Barge Co.	12-31-58/59	19,112.31
Navidad Barge Co.	11-30-59/60	11,180.18
Wolverine Barge Co.	7-31-58/59/60	14,796.70
Huron Barge Co.	2-28-59/60	3,115.89
Michigan Barge Co.	2-28-59/60	4,422.33
Superior Barge Co.	2-28-59/60	4,422.33
Ontario Barge Co.	8-31-59/60	10,442.51
St. Clair Barge Co.	8-31-59/60	10,422.51
Jack Barge Co.	4-30-59/60	16,328.18
C. W. & Letha C. Edwards	12-31-58/59	88,704.60
Keith S. & Mary Edwards	12-31-58/59	67,134.93
John E. & Violet Redding	12-31-58/59	602,34
Everett L. & Helen D. Meley, Jr.	12-31-58/59	559.99
Maurice H. & Lurline M. Hoffman	12-31-58/59	192.76
J. E. Redding, as Trustee of the Shirley & Garland Fielder Trust & Garland W. Fielder	12-31-58/59	232.25
Total Amount in Dispute		$382,678.57

The cases were tried to the Court without a jury. A number of motions with reference to the admission of evidence were taken with the case. They will be discussed and ruled upon later in this memorandum opinion.

Questions Presented for Decision

1. Whether plaintiffs[1] should use useful lives of 35 years

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[1] The plaintiffs involved in the depreciation issue are as follows:

Name of Plaintiff	Civil Action No.
Bay Sound Transportation Co.	63-H-73
Coastal Transportation Co.	63-H-75
Christine Towing Co.	63-H-76
Riverside Transportation Co.	63-H-77
Murray Bay Transportation Co.	63-H-78
Dixon Bay Transportation Co.	63-H-79
Green Bay Transportation Co.	63-H-80
Erie Barge Co.	63-H-81
Ev Barge Co.	63-H-82
Gulf Storage Co.	63-H-83
Lavaca Barge Co.	63-H-84
Naptha Barge Co.	63-H-85
Navidad Barge Co.	63-H-86
Wolverine Barge Co.	63-H-87
Huron Barge Co.	63-H-88
Michigan Barge Co.	63-H-89
Superior Barge Co.	63-H-90
Ontario Barge Co.	63-H-91
St. Clair Barge Co.	63-H-92
Jack Barge Co.	63-H-93
Partners in Louisiana Transportation Co., (later called Oil Cities Transportation Co.):	
C. W. Edwards	63-H-94
J. E. Redding	63-H-96
E. V. Meley	63-H-97
J. E. Redding Trustee	63-H-99
Partners in Sterling Barge Line:	
Keith S. Edwards	63-H-95
C. W. Edwards	63-H-94

for tugs and pushboats, useful lives of 25 years for barges, and salvage values of 10 percent of original cost in calculating their depreciation deductions as the Government contends or shorter periods as the plaintiffs contend.

2. Whether the 21 corporations involved in the Edwards' boat and barge business are entitled to calculate their income taxes with the maximum of $25,000 of taxable income subject to the 30 percent rate (the balance being taxed at the 52 percent rate) as the Government contends, or with a maximum of $525,000 taxed at the 30 percent rate (the balance being taxed at 52 percent) as the corporate plaintiffs[2] contend.

3. Whether corporate plaintiffs must capitalize their organizations costs and deduct them upon surrender of the

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[2] The corporations involved in this issue are:

Name of Plaintiff	Civil Action No.
Bay Sound Transportation Co.	63-H-73
Coastal Transportation Co.	63-H-75
Christine Towing Co.	63-H-76
Riverside Transportation Co.	63-H-77
Murray Bay Transportation Co.	63-H-78
Dixon Bay Transportation Co.	63-H-79
Green Bay Transportation Co.	63-H-80
Erie Barge Co.	63-H-81
Ev Barge Co.	63-H-82
Gulf Storage Co., Inc.	63-H-83
Lavaca Barge Co.	63-H-84
Naptha Barge Co.	63-H-85
Navidad Barge Co.	63-H-86
Wolverine Barge Co.	63-H-87
Huron Barge Co.	63-H-88
Michigan Barge Co.	63-H-89
Superior Barge Co.	63-H-90
Ontario Barge Co.	63-H-91
St. Clair Barge Co.	63-H-92
Jack Barge Co.	63-H-93

corporate charters as the Government contends, or whether they may deduct such costs as a current expense, or in the alternative, amortize them over five years as the plaintiffs contend.[3]

4. Whether C. W. Edwards may deduct $9,500 and $13,100 of personal checks cashed, in 1958 and 1959, on the theory that such amounts were used for travel and entertainment expense.

5. Whether Keith Edwards should be taxed on interest constructively received during 1958 and 1959 of an aggregate of $24,180 as the Government contends or whether such amount was income during 1964 when Keith Edwards finally claimed the cash as he contends.

Statutes and Regulations Involved

The text of the pertinent statutes and regulations are set out in their entirety in Appendix A, *infra*.

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[3] The plaintiffs involved in the organizational expense issue are:

Name of Plaintiff	Civil Action No.
Bay Sound Transportation Co.	63-H-73
Riverside Transportation Co.	63-H-77
Murray Bay Transportation Co.	63-H-78
Dixon Bay Transportation Co.	63-H-79
Green Bay Transportation Co.	63-H-80
Erie Barge Co.	63-H-81
Lavaca Barge Co.	63-H-84
Naptha Barge Co.	63-H-85
Navidad Barge Co.	63-H-86
Huron Barge Co.	63-H-88
Michigan Barge Co.	63-H-89
Superior Barge Co.	63-H-90
Ontario Barge Co.	63-H-91
St. Clair Barge Co.	63-H-92

Statement

Because of the complexity of the facts and the number of parties involved in these cases, the Government endeavored to make a complete and detailed statement of the facts offered into evidence, issue by issue:

As to the depreciation issue:

1. Mr. Charles W. Edwards who is now past 70 years old, originally went into the business of transporting crude oil and petroleum products by tank barge when he was a young man. (Tr. 78-79). Mr. Edwards' father, had been in the boat and towing business in and around Houston and Galveston, Texas, since 1889. (Tr. 39-43, 1384).

2. During and prior to the early 1930's, William Helis, of New Orleans, Louisiana, was active in the oil and gas exploration and production business. At that time Mr. Helis had considerable oil production in the swamp areas in South Louisiana. Mr. Edwards negotiated with Helis with the view to making a partnership for the purpose of transporting all of Helis' production from well sites or gathering points in the marsh areas to refineries. The resulting partnership in which each had a 50 percent interest, was known as Edwards Transportation Co. (Tr. 41-43). During 1950 Mr. Helis died, but Edwards Transportation Co. was continued, Mr. Helis' estate being substituted as a partner. The business activities of Edwards Transportation Co. (which were expanded during the late 1930's to serve the oil industry in general), have continued through the years and are still conducted from the company's headquarters in Houston.

3. Edwards Transportation Co., during the mid 1930's, acquired four tug boats and seventeen barges. By date of

trial of these cases, six barges had been disposed of. All of the vessels have been and are being used full time in Edwards Transportation Co.'s operations. The following tabulation reflects data with respect to all of the tug boats and barges owned and operated by Edwards Transportation Co. since its inception.

[Edwards Transportation Co. Chart on next page.]

4. During the 1930's and 1940's, as Edwards Transportation Co.'s business grew and services were being performed for the oil industry in general, additional vessels were acquired. The next vessels utilized in the Edwards organization were owned by a corporation known as Barge Transport Co., organized July 27, 1939. Mr. Charles Edwards (the partner in Edwards Transportation Co.) years ago owned most of the stock in this corporation and transferred such in trust for benefit of his son, Keith. (Tr. 80-83). Before the taxable years involved in this suit, the stock was distributed to Keith so that during the years in suit he owned such stock. (Tr. 80-84; G. Exs. 7 & 8, pars. 7).

5. The activities of Barge Transport Co. were essentially the same as Edwards Transportation Co. (Tr. 80-86), and during the years from its inception the corporation owned and operated two tug boats, five barges, and one small boat. Data with respect to all of the corporation's vessels are as follows:

[Barge Transport Co. Chart on next page.]

6. Edwards Transportation Co. and Barge Transport Co. have always operated out of Houston. As these two companies' business grew, additional vessels were acquired by related business organizations and integrated into the two companies' fleet. (G. Exs. 7 & 8, pars. 29, 33, 34; Tr. 87-

91, 840-41). The new vessels were controlled and dispatched by Edwards Transportation Co. and Barge Transport Co. (Tr. 852, 854, 91-93). The business organizations that owned the new vessels were paid monthly (based on time and distance factors) by Edwards Transportation Co. and Barge Transport Co. for use of the equipment (Tr. 94, 464-466, 858-859).

7. Thus, it was that Wilkins Barge Line, Ltd., was organized on February 16, 1944. (Tr. 87-92). This partnership during the years before the Court was owned two-thirds by Keith Edwards and one-third by a man named Wilkins. (G. Exs. 7 & 8, pars. 6). The Barge Delta Joint Venture was organized March 7, 1951, with C. W. Edwards as a 50 percent and Delaware Trading Co. (a party not otherwise involved) as the other 50 percent partner. (G. Exs. 7 & 8, pars. 5). Next, Louisiana Transportation Co. was organized on January 1, 1952; during the years before the Court that partnership (which was renamed Oil Cities Transportation Co. in August 1959), had nine partners, the interests of which are set out in the margin.[4] (G. Exs. 7 & 8, pars. 1. 39). Finally January 18, 1952, another partnership, Buffalo Bayou Transportation Co. was organized; during the years before the Court this organization had five partners, data with respect to which is set

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[4]

Name of Partner	Percentage of Partnership Interest
C. W. Edwards	69.131
J. E. Redding	5.217
E. L. Meley, Jr.	5.217
G. C. Linsmier	4.348
L. Z. Walker	4.348
J. E. Redding, Trustee (On August 1, 1959 this interest was conveyed to Inez Weaver)	3.478
C. W. Byrne, Jr.	3.043
M. H. Hoffman	2.609
W. N. Blair	2.609

EDWARDS TRANSPORTATION CO.

Name of Vessel	Type Vessel	Year Built	Year Acquired	Original Cost	Date Disposed of	Age at Disposition	Proceeds received on Disposition	Age at Date of Trial of these cases	Normal Draft of Vessel	Reference in Trial Record as to Source of Data		
										P. Exs.	G. Exs.	
Betty H.	Tug	1937	1937	$30,000	.....	..	.....	29	8½'	4, 14	7, 8	Pars. 41
George Hammon	Tug	1937	1937	30,006	.....	..	.....	29	8½'	"	"	"
Keith Sterling	Tug	1937	1937	29,645	.....	..	.....	29	8½'	"	"	"
Mary C.	Tug	1937	1937	30,000	.....	..	.....	29	8½'	"	"	"
Hiram King	Barge	1937	1937	15[illegible]	.....	..	.....	29	9 '	"	"	"
Curtis Jr.	Barge	1937	1937	16,[illegible]	.....	..	.....	29	9 '	"	"	"
Brazos	Barge	1939	1939	17,000	.....	..	.....	27	9 '	"	"	"
C. W. Dove	Barge	1938	1938	17,030	.....	..	.....	28	9 '	"	"	"
Peggy Coyle	Barge	1937	1937	16,000	5-30-61	24	$25,350	..	9 '	"	"	"
Charles Milby	Barge	1937	1937	15,623	5-30-61	24	25,350	..	9 '	"	"	"
W. J. Wyatt	Barge	1935	1937	13,743	.....	..	.....	31	8½'	"	"	"
Perot	Barge	1938	1938	6,710	.....	..	.....	28	6½'	"	"	"
Trinity	Barge	1937	1937	16,358	.....	..	.....	29	9 '	"	"	"
George E.	Barge	1937	1937	16,000	.....	..	.....	29	9 '	"	"	"
Petroleum	Barge	1940	1940	17,652	5-30-61	21	25,350	..	9 '	"	"	"
Helen Mc	Barge	1937	1937	16,358	7- 63	26	250*	..	9 '	"	"	"
L. J. Cobb	Barge	1936	1937	14,192	.....	..	.....	30	8½'	"	"	"
Salvador	Barge	1940	1940	17,652	.....	..	.....	28	9 '	"	"	"
San Jacinto	Barge	1937	1937	16,358	.....	..	.....	29	9 '	"	"	"
Butte	Barge	UNK	UNK	.....	1942**	UNK	.....	..	...			
Estes	Barge	UNK	UNK	.....	1942**	UNK	.....	..	...			

* After destruction by fire.

** Sank in Gulf of Mexico.

BARGE TRANSPORT CO.

Name of Vessel	Type Vessel	Year Built	Year Acquired	Original Cost	Date Disposed of	Age at Disposition	Proceeds received on Disposition	Age at Date of Trial of these cases	Normal Draft of Vessel	Reference in Trial Record as to Source of Data		
										P. Exs.	G. Exs.	
Mary Edna	Tug	1939	1940	$40,661.47	.....	..	.....	27	8½'	4	7, 8	Pars. 43
Helen M.	Tug	1940	1940	30,753.79	.....	..	.....	26	7½'	"	"	"
Mallard III	Small Boat*	....	5-57	8,000.00	8-28-61	Unknown	Unknown	..	...	"	"	"
Granite	Barge	1946	1946	21,000.00	3-11-64	18	$9,000	..	9½'	"	"	"
Boulder	Barge	1946	1946	21,000.00	5-11-64	18	9,000	..	9½'	"	"	"
Denver	Barge	1939	1940	18,094.40	.....	..	.....	27	9 '	"	"	"
Wichita	Barge	1939	1940	18,013.82	1st half 1965**	26	.....	..	9 '	"	"	"
Casper	Barge	1939	1940	18,013.82	.....	..	.....	27	9 '	"	"	"

* Boat traded in on another small boat.

** Abandoned.

out in the margin.[5] (G. Exs. 7 or 8, pars. 4).

8. Data with respect to all of the vessels owned by the four organizations mentioned in the previous paragraph (from their inception) are as follows:

[Chart on page 85,135.]

9. The business of Edwards Transportation Co. and Barge Transport Co. continued to grow and during the middle and late 1950's there was a need to add additional vessels to the fleet. (Tr. 58). Nineteen new vessels (5 tugs and pushboats and 14 barges) were acquired and placed into operation between 1955 and the end of 1959. These new vessels, as were the vessels before them, operated on a "dispatch" basis through either Edwards Transportation Co. or Barge Transport Co., the two original organizations. (Tr. 836-37, 842, 852, 854-55). The nineteen new vessels were acquired in nineteen different business organizations, one partnership, and eighteen corporations.

10. Data as to the nineteen vessels acquired during 1955 through 1960 are as follows:

[Chart on page 85,136.]

10A. The thickness of the steel used in the vessels constructed during the 1930's is the same as the thickness of

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[5] The partners in Buffalo Bayou Transportation Co. in the years before the Court are as follow:

Name of Partner	Percentage of Partnership Interest
Keith S. Edwards	50
R. E. Wilkins	23
J. E. Gough	18
Herbert S. Fisher, Trustee	5
David Ruffin	4

On September 30, 1961, Ruffin sold his 4 percent to Keith S. Edwards.

those constructed during the 1940's and 1950's. (Tr. 702, 1004, 1010, 1033, 1399, 1405). The only exception is with respect to those barges designed for use in the Gulf of Mexico which were of heavier gauge steel. (Tr. 1464). There is some suggestion in the evidence that the vessels constructed during the 1930's were made of "copper-bearing steel" which means that the steel contained between 2/10 percent and 5/10 percent copper (Tr. 1003; 1005); however, this fact is not established by the record. (Tr. 1003). Copper-bearing steel and "mild steel" (of which later vessels were constructed) corrode at approximately the same rate in salt and fresh water. (Tr. 712, 1584-86, 1600; G. Ex. 11.) However copper-bearing steel deteriorates more slowly than mild steel in the atmosphere. (Tr. 1591-92, 1599). Coatings of various sorts (particularly epoxy) applied to both types of steel exposed to the atmosphere retard corrosion to a marked degree. (Tr. 711, 713, 1579-90, 1599). The Edwards fleet is and has been in the process of receiving original and renewals of epoxy coating. (Tr. 709-11, 1205, 1397, 1404-05, 1456, 1462).

11. Although the so-called "spoon bill" design of barges has been known and used since the late 1940's or early 1950's, none of the vessels in the Edwards fleet constructed through the end of 1959 were of such design. (Tr. 775, 917, 1420). However, vessels constructed and added to the Edwards fleet during the early 1960's were of the "spoon bill" design. (Tr. 779, 917). This design apparently enables a barge to move through the water as much as one or two miles an hour faster (using the same pushing effort) as conventionally designed barges. (Tr. 917). However, the conventionally designed barges constructed for the Edwards fleet through the end of the

1950's are still being constructed and put into service today. (Tr. 1409, 1463-64, 1478).

12. The vessels in the Edwards fleet are used basically in four different bodies of water: (1) offshore in the Gulf of Mexico which is deep salt water; (2) the Mississippi River around New Orleans which is deep fresh water; (3) the Intracoastal Waterway which is relatively shallow, and at places brackish, salt and fresh water; and (4) the bayous, marshes and private canals in the Louisiana Gulf Coast area which are shallow and brackish and salt water. (E.g., Tr. 915).

13. Gradually, as the Edwards fleet expanded, Edwards Transportation Co. and Barge Transport Co. contracted with numerous oil operators and producers to perform the same services originally performed for Helis. Their services entail transporting petroleum products from field gathering points to refineries. The field gathering points are located in various swamp areas in south Louisiana, and the offshore wells are off the Texas and Louisiana coast. From the gathering points, the vessels would proceed to points of discharge, using in [94] most instances the Intracoastal Waterway, Houston Ship Channel, and the Mississippi River. As the vessels proceeded through the various bodies of water they were subjected to the various physical conditions present, such as shallow channels, etc.

Name of Owner	Name of Vessel	Type Vessel	Year Built	Year Acquired	Original Cost	Date Disposed of	Age at Disposition	Proceeds Received on Disposition	Age at Date of Trial of these Cases	Normal Draft of Vessel	Reference in Trial Record as to Source of Data
Wilkins Barge Line, Ltd.	Betty	Barge	1939	2/15/44	$ 13,122.44				27	9 '	P. Ex. 4 :: G. Ex. 16 & 17 :: Par. 3 ::
" " " "	Jimmie T.	Barge	1939	2/15/44	13,629.65				27	9 '	
" " " "	Hazel W.	Tug	1940	2/15/44	18,368.53	6/13/63	23	$20,000.00		7½'	
Barge Delta Joint Venture	Delta	Barge	1951	1951	18,017.16				15	6 '	P. Ex. 4 :: G. Ex. 9 & 10 :: Par. 3 ::
Louisiana Transportation Co.	C. T. & J.	Tug	1956	7/ 1/58	40,220.67				10****	9½'	P. Ex. 4 :: G. Ex. 7 & 8 :: Par. 36-39 ::
" " "	Toni Ann	Push-boat	1957	12/ 1/57	47,360.00				9***	5½'	
" " "									15	5½'	
Louisiana Transportation Co.	Aramis	Tug	1951	8/ 1/53	7,743.00				15	5½'	
" " "	Athos	Tug	1951	8/ 1/53	7,743.27				15	5½'	
" " "	D'Artagnan	Tug	1951	8/ 1/53	7,743.27				15	5½'	
" " "	Porthos	Tug	1951	8/ 1/53	7,743.27				15	5½'	
" " "	Tilia	Tug	1951	8/ 1/53	7,743.27	9/ 4/63	11	$ 4,500.00 *		6½'	
Buffalo Bayou Transportation Co.	Propane	Barge	1952	8/ 1/52	120,912.34				14	10'*	P. Ex. 4 :: G. Ex. 18 & 17 :: Par. 2 ::
" " "	Butane	Barge	1952	8/ 1/52	121,772.34				14	10'*	

* Upon liquidation of partnership on 6/13/63, vessels transferred to Keith Edwards who still owns them.
** Upon liquidation of partnership on 4/8/64, vessels transferred to Keith Edwards who still owns them.
*** Vessel transferred to Riverside Transportation Co. (Plaintiff) during 1959.
**** Vessel transferred to Bay Sound Transportation Co. (Plaintiff) during 1959.
* This vessel was destroyed by fire and the proceeds represent salvage value.

Name of Owner	Date Owner Organized	Name of Vessel	Type Vessel	Date Acquired	Original Cost	Date Disposed of	Age at Disposition	Proceeds rec'd on disposition	Age at Date of Trial of these cases	Normal Draft of Vessel	Reference in Trial Record as to Source of Data
											G. Exs. pars.
Gulf Storage Co., Inc. (a corporation)	10/20/55	Porpoise	Barge	10/ 1/55	$ 54,479.30	6/15/65	10	$21,000	..	8 '	7 & 8 27 & 77 P. Ex. 4
Coastal Transportation Co. (a corporation)	12/20/55	Otter	Barge	3/30/56	92,650.00	.....	..	.....	10	11 '	" 11 & 49 "
Ev Barge Co. (a corporation)	1/11/56	Ev	Barge	2/ 1/56	75,703.51	.....	..	.....	10	11 '	" 25 & 75 "
Jack Barge Co. (a corporation)	4/30/56	Jack	Barge	10/ 1/56	60,367.70	.....	..	.....	10	11 '	" 26 & 76 "
Wolverine Barge Co. (a corporation)	8/16/56	Wolverine	Barge	11/ 1/56	93,650.00	.....	..	.....	10	11 '	" 18 & 62 "
Christine Towing Co. (a corporation)	7/ 9/57	Christine	Pushboat	8/ 1/57	47,750.00	.....	..	.....	9	5 '	" 10 & 48 "
Sterling Barge Co. (a partnership) [1]	12/19/57	Letha C.	Pushboat	1/ 5/58	325,142.56	.....	..	.....	8	8½'	" 2 & 40 "
Michigan Barge Co. (a corporation)	3/25/58	Michigan	Barge	4/ 2/58	48,500.00	.....	..	.....	8	9 '	" 19 & 63 "
Erie Barge Co. (a corporation)	3/25/58	Erie	Barge	4/10/58	48,500.00	.....	..	.....	8	9 '	" 20 & 65 "
Huron Barge Co. (a corporation)	3/25/58	Huron	Barge	4/10/58	48,500.00	.....	..	.....	8	9 '	" 21 & 67 "
Superior Barge Co. (a corporation)	3/25/58	Superior	Barge	4/ 2/58	48,500.00	.....	..	.....	8	9 '	" 22 & 29 "
Ontario Barge Co. (a corporation)	9/15/58	Ontario	Barge	10/ 1/58	39,865.37	.....	..	.....	8	9 '	" 23 & 71 "
St. Clair Barge Co. (a corporation)	9/15/58	St. Clair	Barge	10/ 1/58	39,865.37	.....	..	.....	8	9 '	" 24 & 73 "
Lavaca Barge Co. (a corporation)	12/29/58	Lavaca	Barge	1/12/59	41,183.30	.....	..	.....	7	9 '	" 15 & 56 "
Naptha Barge Co. (a corporation)	1/16/58	Naptha	Barge	2/ 1/58	88,545.58	.....	..	.....	8	11 '	" 16 & 58 "
Navidad Barge Co. (a corporation)	12/29/58	Navidad	Barge	1/12/59	41,183.30	.....	..	.....	7	9 '	" 17 & 60 "
Green Bay Transportation Co. (a corporation)	3/27/59	Green Bay	Tug	4/ 1/59	60,361.82	.....	..	.....	7	6 '	" 14 & 54 "
Murray Bay Transportation Co. (a corporation)	7/13/59	Murray Bay	Tug	9/ 1/59	55,662.26	.....	..	.....	7	5½'	" 13 & 52 "
Dixon Bay Transportation Co. (a corporation)	7/13/59	Dixon Bay	Pushboat	9/ 1/59	55,667.71	.....	..	.....	7	5½'	" 12 & 50 "

All of the foregoing vessels were built of steel and of conventional design. (Tr. 702, 1214, 139[illegible] 8, 1404, 1409, 1459, 1463, 1478).

[1] The partners are Keith S. Edwards and C. W. Edwards.

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14. Although there are no records to indicate how many times it occurred through the years the vessels frequently rubbed bottom. (Tr. 704, 1008-09, 1411, 1455, 1459, 1506-07). Sometimes such rubbing resulted in a puncture of the steel. Other times, the bottoms were dented. All of this has recurred over and over as to all of the vessels.

15. As a result of the vessels rubbing on the bottom, striking together and against docks, bridges, etc., the metal bottoms, sides, fronts, and rears of the barges and boats from time to time had to be renewed. The Company's experience is that the various bottoms had to be replaced in anywhere from six to ten years (Tr. 731-32) and the "knuckles" (where the bottoms join the fronts, sides, and rears) had to be renewed in from three to five years. (Tr. 731). All of the barges have been subject to United States Coast Guard inspection as carriers of Class B cargo (petroleum and petroleum products). (Tr. 844, 1243-45). These inspections occur periodically and the Coast Guard requires that the bottoms, sides, fronts and rears of the vessels be renewed when the original metal has deteriorated to 75 percent or less of its original thickness. (Tr. 161, 843-44). When and as necessary, the vessels have been renewed. (See par. 20, *infra;* Tr. 99, 761, 768, 772-75, 1395-1400). When vessels are not renewed they must be removed from service.

16. The Edwards fleet and the various organizations that own the vessels have always followed a practice of charging to expense items such as new bottoms for barges, etc., even though such portions could be expected to have a useful life of greater than one year. This depreciation treatment has been done with the acquiescence of personnel of the Internal Revenue Service. (Tr. 514, 517-20, 848-49).

17. The cargo transported by the barges in the Edwards fleet in the early years was in great part crude oil. In later years, more and more distillate has been transported until during the years before the Court about half of the cargo was crude oil and the other half was distillate. (G. Exs. 9 & 10, pars. 2(s)). Distillate has a characteristic of cleaning the inside portions of a tank barge so as to expose the inside to the air inside the barges; (Tr. 283) on the other hand, crude oil has a tendency to coat the interior portions of the barge so that the metal is not exposed to air inside the barges. (Tr. 283).

18. The Edwards fleet's barges have never been manned; crews, of course, man the various boats and are present on the barges that are in the boat's tow. During the 1930's and 1940's members of the boat's crews worked, in their spare time, scraping and repainting the exposed surfaces of the barges and boats on which they worked. With the passage of years, this practice has decreased due primarily to the reduction (brought about in a desire to reduce costs) in the number of men on the boats. The day to day preventive maintenance on the Edwards fleet has thus decreased. (Tr. 856).

19. Edwards Transportation Co. has been extremely profitable through the years. During 1958 and 1959 Mr. C. W. Edwards' 50 percent distributive portion of Edwards Transportation Co. produced for him respectively $72,157 and $93,811. (G. Exs. 7 & 8 pars. 78). Louisiana Transportation Co., the partnership, has also been extremely lucrative for Mr. Edwards through the years, and during 1958 and 1959 it produced, for his 69 percent interest, distributive shares of $262,962 and $367,909, respectively. (G. Exs. 7 & 8, pars. 78). Sterling

barge line, the partnership which operated the Edwards fleet's most expensive vessel (the Letha C., which cost $325,000) generated for Mr. Edwards' 50 percent interest $24,136 and $39,323 during 1958 and 1959. (G. Exs. 7 & 8, pars. 78). Mr. Edwards' personal income tax bracket was in excess of 90 percent during the years involved. (Tr. 204). Mr. Edwards personally received ¼ of a cent per barrel for all crude oil or distillate transported.

20. The following table reflects, by year, from date of vessel acquisition the (1) total revenue earned (net of amounts paid out for chartered equipment and vessels); (2) amounts currently deducted by the owners as repairs and maintenance expense (even though such items including replacing vessels' sides, bottoms, knuckles, etc.); and (3) taxable income produced by vessel:

	Edwards Transportation Co. (18 vessels)				Barge Transportation Co. (7 vessels)			
Year ending during	Revenue *	Repairs	Taxable Income *	Record Reference	Revenue *	Repairs *	Taxable Income	Record Reference
1951				P. Ex. 14			$69,012	P. Ex. 6, p. 3
1952		$ 39,562		P. Ex. 14			82,189	P. Ex. 6, p. 3
1953		59,676		P. Ex. 14			72,478	P. Ex. 6, p. 3
1954		91,557		P. Ex. 14			37,494	P. Ex. 6, p. 3
1955		50,064		P. Ex. 14			41,907	P. Ex. 6, p. 3
1956		41,898		P. Ex. 14			66,655	P. Ex. 6, p. 3
1957		96,640		P. Ex. 14			95,825	P. Ex. 6, p. 3
1958		84,524		P. Ex. 14			48,633	P. Ex. 6, p. 3
1959		93,795		P. Ex. 14			65,471	P. Ex. 6, p. 3
1960		76,987		P. Ex. 14			41,987	P. Ex. 6, p. 3
1961		85,431		P. Ex. 14			55,563	P. Ex. 6, p. 3
1962		135,391		P. Ex. 14			44,225	P. Ex. 6, p. 3
1963		62,379		P. Ex. 14			42,672	P. Ex. 6, p. 3
1964		78,849		P. Ex. 14			57,812	P. Ex. 6, p. 3
1965		71,700		P. Ex. 14			.....	P. Ex. 6, p. 3
1966		82,459		P. Ex. 14			.....	P. Ex. 6, p. 3

* Data not furnished despite service of interrogatories by the Government.

	Wilkins Barge Line (partnership)									
	Barge Betty **			Tug Hazel W.**			Barge Jimmy T.**			
Year Ending During	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Record Reference
1951	$48,853	$2,574	*	$48,853	$2,574	*	$48,853	$2,574	*	P. Ex. 5, pp. A-20-22
1952	52,391	3,463	*	52,391	3,467	*	52,391	3,463	*	P. Ex. 5, pp. A-20-22
1953	50,140	5,955	*	50,140	5,955	*	50,140	5,955	*	P. Ex. 5, pp. A-20-22
1954	46,088	1,307	*	46,088	1,307	*	46,084	1,307	*	P. Ex. 5, pp. A-20-22
1955	38,220	1,116	*	38,220	1,116	*	38,220	1,116	*	P. Ex. 5, pp. A-20-22
1956	29,229	4,736	*	29,229	4,736	*	29,229	4,736	*	P. Ex. 5, pp. A-20-22
1957	46,753	5,496	*	46,753	5,496	*	46,753	5,496	*	P. Ex. 5, pp. A-20-22
1958	43,275	3,045	*	43,275	3,045	*	43,275	3,045	*	P. Ex. 5, pp. A-20-22
1959	39,913	2,615	*	39,913	2,615	*	39,913	2,615	*	P. Ex. 5, pp. A-20-22
1960	40,487	715	*	40,487	715	*	40,487	715	*	P. Ex. 5, pp. A-20-22
1961	40,388	2,336	*	40,388	2,336	*	40,388	2,336	*	P. Ex. 5, pp. A-20-22
1962	40,230	637	*	40,230	637	*	40,230	637	*	P. Ex. 5, pp. A-20-22
1963	34,476	7,247	*	34,476	7,247	*	34,476	7,247	*	P. Ex. 5, pp. A-20-22
1964	12,562	164	*	12,562	164	*	12,562	164	*	P. Ex. 5, pp. A-20-22
1965										
1966										

* Data not furnished despite service of interrogatories by the Government.
** Total figures are allocated one-third to each vessel.

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Year Ending During	Buffalo Bayou Transportation — Barges Butane & Propane: Revenue	Repairs	Taxable Income	Record Reference	Bay Sound Transportation Company — C. T. & J.—Tug **: Revenue	Repairs	Taxable Income	Record Reference
1951	.....	.....	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1952	$ 26,683	$ 101	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1953	119,456	560	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1954	75,979	—0—	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1955	55,980	—0—	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1956	60,720	398	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1957	65,320	3,177	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1958	50,147	1,373	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1959	55,200	[illegible]	*	P. Ex. 5, p. A-23	.....	.....	.....	.....
1960	55,200	1,961	*	P. Ex. 5, p. A-23	$45,382	$ 708	$24,575	P. Ex. 5, p. A-10;
1961	52,285	37,626	*	P. Ex. 5, p. A-23	76,714	4,510	39,459	P. Ex. 6, p. 1; Ex.
1962	55,200	1,381	*	P. Ex. 5, p. A-23	72,961	4,446	37,903	0-1 to D. Ex. 15;
1963	49,502	6,999	*	P. Ex. 5, p. A-23	72,728	2,213	33,289	P. Ex. 4, p. 18.
1964	24,778	3,558	*	P. Ex. 5, p. A-23	80,136	3,983	36,808	
1965	*	*	*	P. Ex. 5, p. A-23	89,066	3,634	34,410	
1966	*	*	*	P. Ex. 5, p. A-23	94,020	618	31,008	

* Data not furnished despite service of interrogatories by the Government.
** Owned during the first three years of its operation by Louisiana Transportation Co., and during the balance of the time by Bay Sound Transportation Co.

Year Ending During	Barge Delta-Joint Venture — Barge Delta: Revenue	Repairs	Taxable Income	Record Reference	Riverside Transportation Co. — Pushboat Toni Ann **: Revenue	Repairs	Taxable Income	Record Reference
1951	*	*	*	P. Ex. 5, p. A-24	.....	.....	.....	.....
1952	$ 8,088	—0—	*	P. Ex. 5, p. A-24	.....	.....	.....	.....
1953	9,950	$ 52	*	P. Ex. 5, p. A-24	.....	.....	.....	.....
1954	11,000	—0—	*	P. Ex. 5, p. A-24	.....	.....	.....	.....
1955	10,800	—0—	*	P. Ex. 5, p. A-24	.....	.....	.....	.....
1956	10,800	—0—	*	P. Ex. 5, p. A-24	.....	.....	.....	.....
1957	10,800	—0—	*	P. Ex. 5, p. A-24	.....	.....	.....	.....
1958	10,800	—0—	*	P. Ex. 5, p. A-24	.....	.....	.....	.....
1959	9,908	—0—	*	P. Ex. 5, p. A-24	$ 48,295	$ 2,840	$27,371	P. Ex. 5, p. A-15;
1960	7,560	2,061	*	P. Ex. 5, p. A-24	126,438	13,288	47,494	P. Ex. 6, p. 1;
1961	7,800	—0—	*	P. Ex. 5, p. A-24	98,604	15,227	28,741	Ex. 0-12 to D. Ex.
1962	7,800	72	*	P. Ex. 5, p. A-24	92,501	15,288	28,910	15; P. Ex. 4, p. 18
1963	7,422	8,263	*	P. Ex. 5, p. A-24	94,514	10,639	13,856	
1964	7,800	852	*	P. Ex. 5, p. A-24	82,694	6,718	20,573	
1965	4,832	57	*	P. Ex. 5, p. A-24	91,266	12,439	14,598	
1966	*	*	*	P. Ex. 5, p. A-24	*	*	*	

* Data not furnished despite service of interrogatories by the Government.
** Operated during 1958-59 by Louisiana Transportation Co.

Louisiana Transportation Co. (Later known as Oil Cities Transportation Co.)

Year Ending During	Tug Aramis			Tug Athos			Tug C. T. & J.**			Tug D'Artagnan		
	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income
1952	$ 51,525	$2,352	*	$ 78,509	$2,567	*	.....	....	..	$ 74,647	$3,831	*
1953	12,275	894	*	98,086	3,501	*	.....	....	..	75,651	2,576	*
1954	19,686	591	*	101,037	5,208	*	.....	....	..	57,169	4,917	*
1955	24,000	—0—	*	98,235	5,732	*	.....	....	..	73,702	5,675	*
1956	32,567	24	*	110,971	8,313	*	.....	....	..	110,314	9,389	*
1957	24,000	—0—	*	109,313	7,070	*	$105,820	$6,539	*	72,963	11,309	*
1958	78,707	6,583	*	144,799	5,677	*	80,985	3,923	*	99,354	3,982	*
1959	101,562	8,976	*	147,764	10,239	*	67,138	9,428	*	69,187	9,357	*
1960	98,643	3,206	*	124,171	3,818	*	.....	....	..	41,592	6,519	*
1961	90,709	9,809	*	121,316	6,804	*	.....	....	..	82,210	9,734	*
1962	57,009	5,634	*	88,785	7,608	*	.....	....	..	60,960	4,637	*
1963	68,636	5,827	*	108,588	5,566	*	.....	....	..	72,920	5,825	*
1964	74,756	8,851	*	100,776	8,708	*	.....	....	..	64,944	7,954	*
1965	82,366	5,250	*	85,910	3,524	*	.....	....	..	70,677	5,613	*

Year Ending During	Tug Porthos			Tug Taita			Pushboat Toni Ann ***			Record Reference
	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	
1952	$ 50,608	$2,582	*	$ 48,909	$2,371	*	.....	....	..	P. Ex. 5, pp. A-1—A-8; Ex. N to D Ex. 15
1953	45,997	3,342	*	35,078	2,922	*	.....	....	..	P. Ex. 4, pp. 16-17
1954	58,875	4,917	*	71,587	7,350	*	.....	....	..	P. Ex. 4, pp. 16-17
1955	83,444	6,184	*	83,251	6,089	*	.....	....	..	P. Ex. 4, pp. 16-17
1956	108,765	9,523	*	66,541	9,313	*	.....	....	..	P. Ex. 4, pp. 16-17
1957	100,514	9,806	*	75,242	9,268	*	.....	....	..	P. Ex. 4, pp. 16-17
1958	101,200	4,734	*	81,980	4,010	*	$ 72,193	$2,624	*	P. Ex. 4, pp. 16-17
1959	126,696	6,516	*	105,293	5,495	*	174,208	6,009	*	P. Ex. 4, pp. 16-17
1960	108,441	5,241	*	97,947	2,579	*	.....	....	..	P. Ex. 4, pp. 16-17
1961	87,728	6,345	*	51,972	13,851	*	.....	....	..	P. Ex. 4, pp. 16-17
1962	75,205	5,442	*	69,603	3,660	*	.....	....	..	P. Ex. 4, pp. 16-17
1963	82,178	6,193	*	.....	.....	..	.....	....	..	P. Ex. 4, pp. 16-17
1964	85,775	4,438	*	.....	.....	..	.....	....	..	P. Ex. 4, pp. 16-17
1965	63,892	4,901	*	.....	.....	..	.....	*	..	P. Ex. 4, pp. 16-17

* Data not furnished despite service of interrogatories by the Government. During the fiscal years ending in 1958 and 1959 the partnership's net profit was respectively $377,749 and $531,005. (P. Exs. 8J and 8K).

** Owned during the first three years of operation by Louisiana Transportation Co. and during the balance of the time by Bay Sound Transportation Co.

*** Owned during the first three years of its operation by Louisiana Transportation Co. and during the balance of the time by Riverside Transportation Co.

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Year Ending During	Christine Towing Co.* Pushboat Christine			Dixon Bay Transportation Co.** Pushboat Dixon Bay			Erie Barge Co.*** Barge Erie			Ev Barge Co.**** Barge Ev		
	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income
1952	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1953	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1954	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1955	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1956	.....	.....	.....	.....	.....	.....	.....	.....	.....	$32,463	$ 158	$ 6,821
1957	.....	.....	.....	.....	.....	.....	.....	.....	.....	30,000	288	9,976
1958	$ 65,700	$ 872	$33,064	.....	.....	.....	.....	.....	.....	30,000	83	16,215
1959	146,687	6,502	78,801	.....	.....	.....	$10,500	—0—	($5,909)	30,000	—0—	20,741
1960	152,089	8,046	83,150	$ 65,619	$1,077	$25,038	12,000	—0—	(1,537)	30,000	241	23,165
1961	129,245	9,545	49,861	107,912	7,052	46,394	12,000	—0—	—0—	28,709	9,474	14,259
1962	104,743	5,586	34,702	90,240	5,078	34,539	12,000	—0—	—0—	30,000	576	22,812
1963	81,401	5,766	6,437	84,684	5,130	26,996	11,806	—0—	4,050	30,000	4,404	22,463
1964	106,959	7,791	41,935	79,961	5,796	20,616	12,000	—0—	7,678	27,252	4,280	20,667
1965	113,490	6,477	36,852	88,489	7,132	23,710	11,141	1,544	6,495	30,000	180	23,313
1966	116,291	12,745	32,237	99,490	6,298	9,253	8,823	886	5,496	.....	.....	.....

* The tabulated figures pertaining to this company are derived from information contained in the following references: P. Ex. 5, p. A-11; P. Ex. 6, p. 1; Ex. 0-2 to D. Ex. 15; P. Ex. 4, p. 18.

** The tabulated figures pertaining to this company are derived from information contained in the following references: P. Ex. 5, p. A-12; P. Ex. 6, p. 1; Ex. 0-3 to D. Ex. 15; P. Ex. 4, p. 18.

*** The tabulated figures pertaining to this company are derived from information contained in the following references: P. Ex. 5, p. A-19; P. Ex. 6, p. 2; Ex. 0-4 to D. Ex. 15; P. Ex. 4, p. 19.

**** The tabulated figures pertaining to this company are derived from information contained in the following references: P. Ex. 5, p. A-19; P. Ex. 6, p. 3; Ex. 0-4 to D. Ex. 15; P. Ex. 4, p. 20.

Year Ending During	Green Bay Transportation Co.** Tug Green Bay Revenue	Repairs	Taxable Income	Huron Barge Co.*** Barge Huron Revenue	Repairs	Taxable Income	Jack Barge Co.**** Barge Jack Revenue	Repairs	Taxable Income	Lavaca Barge Co.***** Barge Lavaca Revenue	Repairs	Taxable Income
1952	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1953	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1954	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1955	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1956	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1957	.....	.....	.....	.....	.....	.....	$16,612	—0—	$ 5,034	.....	.....	.....
1958	.....	.....	.....	.....	.....	.....	30,000	—0—	12,844	.....	.....	.....
1959	$ 58,394	$ 5,934	$ 28,235	$10,500	.....	$(5,909)	30,000	—0—	17,721	$16,112	$ 10	$(1,980)
1960	143,092	18,396	55,491	11,000	$ 733	(3,270)	30,000	—0—	21,307	18,000	60	2,960
1961	162,604	22,369	64,729	12,000	—0—	.....	30,000	6	23,642	18,000	—0—	9,921
1962	169,726	24,500	64,276	12,000	—0—	.....	30,000	—0—	25,099	17,322	4,624	6,188
1963	159,992	19,685	75,144	12,000	—0—	2,600	30,000	—0—	23,747	17,980	—0—	14,029
1964	190,065	8,188	113,843	11,366	8,285	(1,413)	27,983	11,397	11,548	16,693	539	13,350
1965	159,610	9,057	63,843	12,000	214	8,446	30,000	68	24,753	17,297	1,075	15,122
1966	.....	.....	.....	9,800	18	7,350	30,000	22	28,796	*	*	*

* Data not furnished despite service of interrogatories by the Government.

** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-13; P. Ex. 6, p. 1; Ex. O-5 to D. Ex. 15; Ex. 4, p. 18.

*** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-16; P. Ex. 6, p. 2; Ex. O-6 to D. Ex. 15; P. Ex. 4, p. 20.

**** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-16; P. Ex. 6, p. 3; Ex. O-6 to D. Ex. 15; P. Ex. 4, p. 20.

***** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-16; P. Ex. 6, p. 1; Ex. O-7 to D. Ex. 15; P. Ex. 4, p. 19

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Year Ending During	Sterling Barge Line.** Pushboat Letha C. Edwards			Michigan Barge Co.*** Barge Michigan			Murray Bay Transportation Co.**** Pushboat Murray Bay			Naptha Barge Co.*****		
	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income
1952	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1953	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1954	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1955	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1956	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1957	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1958	$265,088	$17,525	$48,271	.....	.....	.....	.....	.....	.....	$35,200	$ 523	$ 7,604
1959	276,572	27,491	78,645	$11,000	—0—	$(5,450)	.....	.....	.....	38,640	107	15,812
1960	293,507	21,414	97,424	12,000	—0—	(1,529)	$64,266	$ 1,472	$25,609	38,640	153	21,615
1961	270,675	20,702	75,675	12,000	—0—	—0—	101,189	8,919	34,620	38,640	288	25,361
1962	257,177	12,007	89,726	12,000	—0—	—0—	83,941	6,873	27,936	38,640	—0—	25,658
1963	241,085	6,799	63,780	12,000	$ 8	4,696	88,992	11,790	30,167	30,000	1,714	20,609.
1964	214,415	15,163	53,569	9,530	11,900	(6,849)	87,047	6,943	32,762	24,192	25,077	(7,463)
1965	281,963	28,368	99,535	12,000	252	6,075	92,633	11,354	16,088	25,621	376	17,880
1966	*	*	*	9,800	356	6,792	79,877	11,088	4,574	*	*	*

* Data not furnished despite service of interrogatories by the Government.

** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-9; Ex. O-8 to D. Ex. 15; P. Ex. 4, p. 18.

*** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-17; P. Ex. 6, p. 2; Ex. O-7 to D. Ex. 15, P. Ex. 4, p. 19.

**** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-14; P. Ex. 6, p. 1; Ex. O-5 to D. Ex. 15; P. Ex. 4, p. 18.

***** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-17; P. Ex. 6, p. 2; Ex. O-9 to D. Ex. 15; P. Ex. 4, p. 20.

	Navidad Barge Co.**			Ontario Barge Co.***			Coastal Transportation Co.****			Gulf Storage Co.*****		
	Barge Navidad			Barge Ontario			Barge Otter			Barge Porpoise		
Year Ending During	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income
1952	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1953	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1954	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1955	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1956	.....	.....	.....	.....	.....	.....	$24,375	$ 429	($1,455)	$15,048	$3,863	($7,294)
1957	.....	.....	.....	.....	.....	.....	35,500	5,050	1,377	18,000	4,007	(1,229)
1958	.....	.....	.....	.....	.....	.....	33,000	—0—	15,109	16,[illegible]	7,682	*
1959	$15,774	.....	($2,579)	$14,545	—0—	($3,297)	20,856	11,771	(3,113)	15,000	—0—	43
1960	18,000	—0—	2,422	16,200	—0—	250	15,600	35	6,084	15,000	*	10,453
1961	18,000	—0—	9,921	16,200	—0—	8,224	15,600	178	8,886	7,807	—0—	4,829
1962	18,000	—0—	11,528	16,200	—0—	9,832	15,600	322	7,088	6,780	—0—	4,056
1963	18,000	$ 226	13,912	16,200	$ 40	12,056	15,600	745	11,075	6,780	—0—	5,170
1964	12,437	5,463	4,119	15,089	10,797	1,548	15,600	765	11,798	6,780	—0—	5,658
1965	16,899	4,607	11,299	15,829	1,262	13,478	10,124	8,228	724	3,390	—0—	7,353
1966	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

* Data not furnished despite service of interrogatories by the Government.

** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-17; P. Ex. 6, p. 2; Ex. O-9 to D. Ex. 15; P. Ex. 4, p. 19.

*** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-17; P. Ex. 6, p. 2; Ex. O-9 to D. Ex. 15; P. Ex. 4, p. 19.

**** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-19; P. Ex. 6, p. 1; Ex. O-10 to D. Ex. 15; P. Ex. 4, p. 20.

***** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-16; P. Ex. 6, p. 3; P. Ex. 4, p. 20; Ex. O-10 to D. Ex. 15.

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Year Ending During	St. Clair Barge Co.** Barge St. Clair			Superior Barge Co.*** Barge Superior			Wolverine Barge Co.**** Barge Wolverine		
	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income	Revenue	Repairs	Taxable Income
1952	.....	.....	.....	.....	.....	.....	.....	.....	.....
1953	.....	.....	.....	.....	.....	.....	.....	.....	.....
1954	.....	.....	.....	.....	.....	.....	.....	.....	.....
1955	.....	.....	.....	.....	.....	.....	.....	.....	.....
1956	.....	.....	.....	.....	.....	.....	.....	.....	.....
1957	.....	.....	.....	.....	.....	.....	.....	.....	.....
1958	.....	.....	.....	.....	.....	.....	$27,016	$ 4,292	($5,035)
1959	$14,545	—0—	($3,297)	.....	.....	.....	34,533	46	4,065
1960	16,200	—0—	250	$11,000	—0—	($5,450)	26,656	13,048	(3,524)
1961	16,200	—0—	8,224	12,000	—0—	(1,529)	15,000	214	1,882
1962	16,200	—0—	9,712	12,000	—0—	—0—	15,600	519	5,609
1963	16,200	$ 117	11,996	12,000	$ 108	—0—	15,600	—0—	6,477
1964	16,057	51	13,272	10,564	12	4,553	15,600	955	9,326
1965	15,211	2,623	11,480	7,601	1,270	(1,483)	15,600	161	11,686
1966	*	*	*	12,000	1,270	7,439	15,083	4,176	8,419
				9,800	398	6,926	*	*	*

* Data not furnished despite service of interrogatories by the Government.

** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-17; P. Ex. 6, p. 3; Ex. O-10 to D. Ex. 15; P. Ex. 4, p. 19.

*** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-18; P. Ex. 6, p. 2; Ex. O-11 to D. Ex. 15; P. Ex. 4, p. 19.

**** The tabulated figures pertaining to this company are derived from information contained in the following record references: P. Ex. 5, p. A-18; P. Ex. 6, p. 2; Ex. O-11 to D. Ex. 15; P. Ex. 4, p. 20.

21. Vessels such as the boats and barges owned by the Edwards interests can be kept in serviceable condition and their useful lives can be prolonged indefinitely if the owners spend the necessary funds to renew, repair, and maintain the vessels. (Tr. 698, 771-72, 694, 1002-03, 1020, 1062, 1072, 1206-07, 1402, 1406).

21A. The useful life of barges or tugs to the Edwards interests is directly related to whether the Edwards interests find it economical to continue to use the vessels in their operations. (Tr. 694, 696, 1209, 1217, 1225-26, 1479).

21B. The Edwards interests have found it economical to utilize their vessels for their full physical life. The policy of the Edwards interests over the past thirty years has been to expend money as necessary to keep their vessels in good working condition, and accordingly to prolong the useful life of their vessels. (Tr. 1242, 1247, 775; Pars. 3, 5, 8, 10, 20, *supra*).

21C. The Edwards interests, over the past thirty years, have retired but few of their vessels from service. (Pars. 20, 3, 5, 8, 10, *supra; e.g.*, Tr. 761, 768, 772-75, 779.)

As to the multiple corporation issue:

22. Barge Transport Co., the original corporation in the group of corporations involved in this case, was organized and has operated since 1939. The shareholders of this corporation at all times pertinent to this case were:

(1) Keith Edwards, plaintiff in Civil Action No.63-H-95, the only child of Mr. C. W. Edwards; Keith Edwards was 40 years old when this case was tried. (Tr. 1371, 1384).

(2) John E. Redding, plaintiff in Civil Action No. 63-H-96, who functions as the general manager of the whole group of companies. (Tr. 789).

(3) Miss Pauline Lambert; Miss Lambert ceased to be a shareholder on November 16, 1960, when the corporation redeemed her stock; she is C. W. Edwards' sister. (G. Exs. 9 and 10, pars. 10).

(4) Mrs. Letha C. Edwards, one of the plaintiffs in Civil Action No. 63-H-94, who is the wife of Mr. C. W. Edwards. (G. Exs. 9 and 10, pars. 10).

(5) Mrs. Evelyn Owens Edwards; Mrs. Edwards is a sister-in-law of C. W. Edwards. (D. Exs. 9 and 10, pars. 10). (G. Exs. 7 and 8 pars. 7).

23. The officers of Barge Transport Co., at all times here relevant were Keith Edwards, President, Charles W. Edwards, Vice-President; and Jack Redding, Secretary and Treasurer. The same three men formed the Board of Directors of the corporation at all times here pertinent. (P. Ex. 4, p. 23).

24. The stock of Bay Sound Transportation Co., the corporation organized August 1, 1959, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	67.131	$ 772.00
J. E. Redding	5.217	60.00
Edwards' Employees	27.652	318.00
		$1,150.00

Bay Sound Transportation Co. and C. W. Edwards has options to acquire the stock owned by the employees (and Mr. Redding). (G. Exs. 7 & 8, Pars. Tr. 643-645, 844, 975, 1294-95; P. Ex. 8L).

25. Riverside Transportation Co., the corporation organized August 1, 1959, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	67.131	$ 772.00
J. E. Redding	5.217	60.00
Edwards' Employees	27.652	318.00
		$1,150.00

Riverside Transport and C. W. Edwards had options to acquire the stock owned by the employees and Mr. Redding. (G. Exs. 7 and 8, Pars. 9; Tr. 643-45, 844, 975, 1294-95; P. Ex. 8Q).

26. Christine Towing Co., the corporation organized July 9, 1957, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
Keith Edwards	98	$ 980.00
J. A. Hendricks (an Employee of Edwards Transportation Co. and Barge Transport Co.)	1	10.00
C. W. Edwards	1	10.00
		$1,000.00

(G. Exs. 7 and 8, Pars. 10; Tr. 1294-95; P. Ex. 8A).

27. Coastal Transportation Co., the corporation organized December 20, 1955, at all times pertinent was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
J. E. Gough	50	$ 500.00
C. W. Edwards	21	210.00
Keith Edwards	25	250.00
J. E. Redding	4	40.00
		$1,000.00

Coastal Transportation Co. and C. W. Edwards had options to acquire the stock owned by Messrs. Redding and Gough. (G. Exs. 7 and 8, pars. 11; Tr. 643-45, 844, 975, 1294-95; P. Ex. 8R).

28. Dixon Bay Transportation Co., and Murray Bay Transportation Co., the corporations organized July 13, 1959, at all times here pertinent were owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
G. W. Edwards	41.5	$ 477.25
Keith S. Edwards	41.5	477.25
J. E. Redding	3	34.50
Edwards' employees	14	161.00
		$1,150.00

(G. Exs. 7 and 8, Pars. 12 and 13; Tr. 1294-95; P. Exs. 8M and 8P).

29. Green Bay Transportation Co., the corporation or-

ganized March 27, 1959, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	73	$ 730.00
Keith S. Edwards	10	100.00
J. E. Redding	3	30.00
Employees of Edwards Transportation Co. and/or Barge Transport Co.	14	140.00
		$1,000.00

(G. Exs. 7 and 8, Pars. 14; Tr. 1294-95; P. Ex. 8N).

30. Lavaca Barge Co., the corporation organized December 29, 1958, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	98	$ 980.00
Letha C. Edwards	1	10.00
Keith C. Edwards	1	10.00
		$1,000.00

(G. Exs. 7 and 8 Pars. 15; Tr. 1294-95; P. Ex. 8GG).

31. Naptha Barge Co., the corporation organized December 31, 1958, at all times here pertinent was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
Keith S. Edwards	99.8	$ 998.00
C. W. Edwards	.1	1.00
J. A. Hendricks (an employee of Edwards Transportation Co. and Barge Transport Co.)	.1	1.00
		$1,000.00

(G. Exs. 7 and 8, Pars. 16; Tr. 1294-95; P. Ex. 8KK).

32. Navidad Barge Co., the corporation organized December 29, 1958, at all times here pertinent was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	98	$ 980.00
Letha C. Edwards	1	10.00
Keith Edwards	1	10.00
		$1,000.00

(G. Exs. 7 and 8, Pars. 17; Tr. 1294-95; P. Ex. 8MM).

33. Wolverine Barge Co., the corporation organized August 16, 1956, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
J. E. Gough	50	$ 500.00
Keith Edwards	49	490.00
C. W. Edwards	1	10.00
		$1,000.00

Wolverine Barge Co. and C. W. Edwards had an option to acquire Mr. Gough's stock in Wolverine Barge Co. (G. Exs. 7 and 8, Pars. 18; Tr. 643-45, 844, 975, 1294-95; P. Ex. 8XX).

34. Michigan Barge Co., Erie Barge Co., Huron Barge Co., and Superior Barge Co., which corporations were all organized March 25, 1958, at all times here pertinent, were owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
J. E. Gough	40	$ 400.00
H. V. Huckaby (Mr. Gough's employee)	5	50.00
T. H. Bryant (Mr. Gough's employee)	5	50.00
Louisiana Transportation Co.[8]	50	500.00
		$1,000.00

(G. Exs. 7 and 8, Pars. 19, 22; Tr. 1294-95; P. Exs. 8V, 8CC, 811 8SS).

[8] As is indicated in paragraph 7, *supra*, the partners in Louisiana Transportation Co., Ltd., are C. W. Edwards, 69.131%; Jack Redding, 5.217%; employees of Edwards Transportation Co. and/or Barge Transport Co., 27.652%. Louisiana Transportation Co. had options to acquire from Messrs. Gough, Huckaby and Bryant the interests they owned in Michigan Barge Co., Erie Barge Co., Huron Barge Co. and Superior Barge Co. (Tr. 844, 943-45, 975).

35. Michigan Barge Co., Erie Barge Co., Huron Barge Co., and Superior Barge Co., respectively, had options to acquire the stock owned in each corporation by Messrs. Gough, Huckaby, and Bryant; C. W. Edwards also had option to acquire the stock in the foregoing four corporations owned by Messrs. Gough, Huckaby and Bryant. (Tr. 643-45, 844, 975).

36. Ontario Barge Co., the corporation organized September 15, 1958, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	90	$ 900.00
J. E. Redding	5	50.00
Employees of Edwards Transportation Co.	5	50.00
		$1,000.00

(G. Exs. 7 & 8, Pars. 23; Tr. 1294-95; P. Ex. 800).

37. St. Clair Barge Co., the corporation organized September 15, 1958, at all times here pertinent was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	90	$ 900.00
J. E. Redding	5	50.00
Employees of Edwards Transportation Co.	5	50.00
		$1,000.00

(G. Exs. 7 & 8, Pars. 24; Tr. 1294-95; P. Ex. 8QQ).

38. Ev Barge Co., the corporation organized January 11, 1956, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W Edwards	90	$ 900.00
J. E. Redding	5.5	55.00
Employees of Edwards Transportation Co.	4.5	45.00
		$1,000.00

(G. Exs. 7 & 8, Pars. 25; Tr. 1294-95; P. Ex. 8Y).

39. Jack Barge Co., the corporation organized April 30, 1956, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W Edwards	90	$ 900.00
J. E. Redding	5.5	55.00
Employees of Edwards Transportation Co.	4.5	45.00
		$1,000.00

(G. Exs. 7 & 8, Pars. 26; Tr. 1294-95; P. Ex. 8EE).

40. Gulf Storage Co., the corporation organized October 20, 1955, at all times here pertinent, was owned as follows:

Name of Shareholder	Percentage of Stock Owned	Investment
C. W. Edwards	80	$ 880.00
J. E. Redding	10	110.00
Employees of Edwards Transportation Co.	10	110.00
		$1,100.00

(G. Exs. 7 & 8, Pars. 27; Tr. 1294-95; P. Ex. 8AA).

41. Bay Sound Transportation Co. and Riverside Transportation Co., the corporations described in paragraphs 26 and 27, *supra*, acquired the vessels C. T. & J. and Toni Ann from the partnership Louisiana Transportation Co. at or about the time they were organized. (G. Exs. 7 & 8, Pars. 44, 46). The remaining eighteen corporations (described in pars. 28 through 42, *supra*) each acquired one new vessel at or about the time they were organized. (See Par. 10, *supra*).

42. Each of the eighteen new vessels acquired by eighteen corporations were acquired in essentially the same fashion. First, the decision to construct the vessel was made by Mr. C. W. Edwards, the Vice-President of the original corporation, Barge Transport Co. (Tr. 1369-70); this decision was made after counseling with Jack Redding, the general manager of the entire fleet, Ev Meley, the engineer for the entire fleet, Keith Edwards, Mr. Edwards' son, and Mr. Amiel Sumrow, the CPA who was the internal auditor and financial manager for all of the business. (Tr. 1369-70, 987-89, 925, 480-81, 227). Once the decision to construct a vessel was made, an order for the construction of the vessel was placed. While the vessel was under construction, and about the time for

delivery thereof, Mr. Edwards would call upon either the Texas National Bank or the National Bank of Commerce in Houston to arrange for a loan to cover the full acquisition cost. (Tr. 1338-42, 1351-59). Most of the loans paid the entire total cost of the construction and, in many instances, provided additional funds for operating expenses. (*Ibid;* See Par. 10, *supra.**). Repayment of all the loans was guaranteed by Mr. C. W. Edwards. The banks, of course, were relying on his guarantee as well as the security offered by the value of the vessel, which was generally covered by a chattel mortgage. (Tr. 1352-60, 1367, 1338-45). Mr. Edwards never furnished the banks (nor did the banks request), financial data on himself or any of the eighteen corporations. (Tr. 1344-45, 1348, 1359-60). Mr. Edwards had had a long course dealing with these two banks and was well known and trusted as a responsible person. (Tr. 1273, 1360).

43. After the decision to construct each of the eighteen new vessels was made, and the order therefore was placed with the company doing the construction work, the corporation to receive the vessel when completed, was organized. (Tr. 1123-27). Whatever property rights that existed in the vessels under construction, were acquired by each of the eighteen new corporations and when and as the vessels were completed and delivered, the corporations took titles.* Then, the vessels were placed into service in the Edwards fleet.

44. Of the twenty corporations organized between 1955 and 1960, 14 each owned one barge, and 6 each owned

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* For instance, the Barge Navidad cost $41,000 (see Par. 10, *supra*) but the loan on January 12, 1959, was $43,000. (Tr. 1356).

* Most of the vessels were delivered from a few days to a few weeks after the owner-corporation was organized. (See Par. 10, *supra*).

one boat. (G. Exs. 7 & 8, Pars. 37, 38, 44, 46, 48, 49, 50, 52, 54, 56, 58, 60, 62, 63, 65, 67, 69, 71, 73, 75, 76 and 77). None of the barge corporation had any employees. The only employees of the boat corporation other than members of the crews, are as follow:

Name of employee	Name of corporation-employer
Keith Edwards	Christine Towing Co.
J. A. Hendricks (maintenance)	Christine Towing Co.
Vera McNeilly (bookkeeper)	Green Bay Transportation

(Tr. 449-457; P. Ex. 4, pp. 24-42).

Messrs. Edwards and Hendricks were also employees of either Barge Transport Co. or Edwards Transportation Co. and they drew the bulk of their pay from these organizations. (P. Ex. 4, pp. 39-42). The administrative personnel for the organization were employed by either Edwards Transportation Co. or Barge Transport Co. (Tr. 459-75).

45. The operation of Edwards Transportation Co. and Barge Transport Co., the several partnerships that owned vessels (Wilkins Barge Line, Louisiana Transportation Co., Buffalo Bayou Transportation Co., Barge Delta Joint Venture, and Sterling Barge Line), and the twenty vessel-owning corporations was essentially as follows:

(a) All of the companies utilized the same office address. (G. Exs. 7 & 8, Pars. 34).

(b) Edwards Transportation Co. and Barge Transport Co. had telephone listings and were the only two companies known (other than Wilkins Barge Line for a time)

to the general public; these two companies obtained all business for the entire group of Edwards' companies. (G. Exs. 7 & 8, Pars. 33; Tr. 479-480, 765-67, 852).

(c) When Edwards Transportation Co. or Barge Transport Co. obtained a contract for the transportation of petroleum products, Mr. Redding was given the job of seeing that appropriate vessels were assigned to the job. Mr. Redding, of course, knew the capacity and capability of each of the vessels and would assign the appropriate number of barges and boats to the tasks. The company maintained a dispatching office in New Orleans and another in Houston, and contact was made with the boat captain to advise him what barges to pick up, where he should go, and what he should do. The dispatchers in New Orleans and Houston and Mr. Redding were all employees of Edwards Transportation Co. and/or Barge Transport Co. (Tr. 111-114, 93, 791, 852-54).

(d) In those circumstances where the Edwards fleet had no vessels available to perform a contract, outsiders were contacted and a sub-contract was made with these outsiders to either furnish one or two barges or a tugboat or a whole tow, as necessary, for the job at hand. However, in dispatching the vessels to the job sites, preference was always given to vessels owned in the Edwards fleet, and about 90 percent of the work that was obtained through Edwards Transportation Co. and Barge Transport Co. was done by the Edwards fleet itself. (Tr. 479-80, 852-56).

(e) Of course, there were no formal negotiations or contracts let between Edwards Transportation Co. and/or Barge Transport Co. and the five partnerships and twenty vessel-owning corporations. Instead, the vessels were dispatched to perform the work, much like taxicabs are dis-

patched, and an intercompany billing process followed. Those corporations and partnerships which owned barges determine which boat corporations and partnerships used their barges during the particular month just past. Records covering this were maintained by either Edwards Transportation Co. or Barge Transport Co. Amounts to be collected from the boat corporations and partnership by all of the various barge corporations and partnerships were recorded on the books of the various barge corporations and partnerships as "accounts receivable". The amounts were then entered into the books of account of the boat corporations and partnerships as "accounts payable". Then the boat companies calculated the amounts "owed" them by either Edwards Transportation Co. or Barge Transport Co. for transportation services performed during the preceding month. Such amounts were recorded on the boat companies' books of account as "accounts receivable". (Tr. 458-473, 854-59).

(f) Barge Transport Co. and Edwards Transportation Co. recorded the boat companies' charges as "accounts payable". Barge Transport Co. and/or Edwards Transportation Co. would then bill the person for whom the services were performed, such as Texaco, Inc., Gulf Refining Co., etc. When the money covering the invoices was received by Edwards Transportation Co. and/or Barge Transport Co., they drew checks on their respective bank accounts to pay the boat companies; the boat companies deposited the checks and drew checks of their own in favor of the barge companies. All of this bookkeeping work was accomplished in one office by five or six bookkeepers who were employees of Edwards Transportation Co. and/or Barge Transport Co. Books of account were maintained for each of the twenty new corporations and,

of course, bank accounts were maintained. (Tr. 458-473, 854-59).

(g) When a particular vessel needed repairs, the captain in control would proceed to either Edwards Transportation Co.'s shipyard in southern Louisiana, or to the closest shipyard. Contact would then be made with the Barge Transport Co. and/or Edwards Transportation Co.'s office in Houston or New Orleans for instructions. (Tr. 117-118). When the work was done, the bill was generally submitted by the company performing the work to Edwards Transportation Co.; the bill would be filtered into the hands of whichever organization owned the vessel on which the work was done, and an appropriate check was drawn to pay the debt. (Tr. 635-37, 723-24, 765-67). All of the tow boat crews were hired by the organization's personnel manager in New Orleans. (Tr. 473-75, 663).

(h) Both Edwards Transportation Co. and Barge Transport Co. paid the boat companies slightly less than the amounts they billed their customers. This generally amounted to a fraction of a cent per barrel of petroleum products moved. Thus, Edwards Transportation Co. and Barge Transport Co. had revenues not only from the operations of their own barges and boats, but also from this "service charge" it made to the other partnerships and corporations in the group when their vessels were dispatched. (Tr. 62, 527).

46. All of the key personnel in the Edwards organization were informed of and aware of the potential tax advantage that could be accomplished by spreading income from one business over more than one corporation. They were aware that, during the late 1950's, the federal income

tax rate applicable to corporations was 30 percent on the first $25,000 of taxable income, and 52 percent on all taxable income in excess of $25,000. (Tr. 204-211, 435, 448-49, 490-91, 499, 504-505, 646, 846-849, 867-68, 1607-10). Mr. Sumrow, the C. P. A.-employee of Edwards Transportation Co., discussed the potential tax advantage that could be achieved by splitting the Edwards business into several corporations with Mr. Edwards, Mr. Jack Redding, and Mr. Meley, all of whom were the managerial personnel in the organization. (Tr. 441-449, 480-500, 504-05). There were discussions among the key personnel during 1955 and 1956 (contemporaneously with the organization of the first of the twenty corporations that were organized between 1955 and 1960) pertinent to the tax advantages to be achieved through the use of several corporations rather than one corporation. (Tr. 439-449, 480-500, 868). As a matter of fact, Mr. Sumrow, the C. P. A., made projections of income and expense to ascertain the cash flow that would be produced for several of the newly constructed vessels. (Tr. 439-449, 480-481, 850). In making these projection studies, a deduction for income tax was always predicated upon the tax rate of 30 percent (not 52 percent) on the first $25,000 of taxable income for each vessel. (Tr. 444, 448, 850).

Although the officials of the Edwards organization allegedly had formal meetings to discuss and decide upon the use of multiple corporations in their operations, no minutes or writings of any kind were ever made to reflect what, if anything, happened. The only real evidence supporting plaintiffs' testimony is one letter written by Edwards' admiralty attorneys during the adminstrative processing of this case by the Internal Revenue Service. (Tr. 255, 257-61, 312, 584, 897-98, 1632; G. Ex. 1 for identification G. Ex. 18).

48. Mr. Charles Edwards is the person in the organization who made the ultimate decision of whether or not multiple corporations would be utilized. This would be done after considering the recommendations of the other key personnel. (Tr. 212-214, 1369-70). Mr. Edwards testified that he had not considered tax matters in deciding to incorporate each vessel constructed during the period of 1955 through 1960 and had not discussed such matters with tax counselors. (Tr. 55-57, 238, 239, 242-243). The federal taxation specialist employed by a national certified public accounting firm in Houston, Texas in fact was sought out by Mr. Edwards and from him Mr. Edwards and other of his employees obtained counseling contemporaneously with the formation of the first of the twenty corporations as to the tax advantage of the use of multiple corporations. The counseling was to the effect that (1) there was a maximum tax saving of $5,500 per annum to be achieved for each additional corporation that was utilized in the Edwards operation, and (2) there was an exemption from accumulated earnings tax of $60,000 which was allowed to each corporation. The counseling was to the effect that if Edwards used twenty-one corporations in his fleet operation instead of one corporation, there was a maximum tax savings that could be achieved of $110,000 per annum. (Tr. 1612-1617).

49. Mr. Charles Edwards, who is aging and infirm, in recent years and at the trial of this case, manifested a consistent failing of his capacity to recollect recent occurrences. He is able to vividly recount transactions that occurred during the 1930's and 1940's, but is unable to clearly recall transactions that occurred during the 1950's. (Tr. 75, 83, 84, 96, 97, 98, 99, 100, 101, 103, 104, 105-106, 134, 137).

50. Mr. Keith Edwards was not at all concerned during the 1950's whether the next vessel to be constructed (or any vessels) were placed in one of the existing partnerships or in a new corporation. As a matter of fact, he did not keep track of who owned the new vessels. He was concerned primarily with the operation of the vessels. (Tr. 1369-70).

51. Mr. Jack Redding, the general manager of the operation, was never really in a position to dictate policies. He discussed business matters and recommended courses of action, but Mr. Edwards himself was the decisive person. (Tr. 867-868, 925, 1369-70).

52. Mr. Amiel Sumrow, during the time when the first one or two (of the twenty corporations involved) were organized, expressed his concern to Charles Edwards and Redding about the possible tax problems that would accrue as a result of the use of the numerous corporations. Mr. Sumrow read the accounting periodicals and studied tax services, and cautioned Mr. Edwards that a business purpose was necessary. (Tr. 486, 488, 500).

53. Of all the persons in the Edwards organization, Mr. Ev Meley, Jr., the partner in Louisiana Transportation Co., displayed the most concern about his possible liability to the public as a result of liability. During the middle 1950's, he was in charge of handling the damage claims against Edwards Transportation Co. *et al.* In talking to lawyers in New Orleans, he was advised of his possible exposure as a partner for claims against the partnership. He was counseled to the effect that the corporate device would limit his liability to the investment in the corporation, and that the most conservative of all positions was to incorporate each vessel. Nothing was ever done to reduce Mr. Meley's

exposure as a partner, for he remains a partner in Louisiana Transportation Company (now called Oil Cities Transportation Co.). As a matter of fact, this partnership owns half of the stock in several of the corporations (see, Par. 34, *supra,* and, of course, Mr. Meley himself owns stock in other corporations, all of which would be subject to seizure by his creditors. (Tr. 906-907).

54. Through the years going back to the 1930's, Mr. Charles Edwards' Houston admiralty attorney counselled with him in respect to the limitation of liability that would be afforded through the use of the corporate device. (Tr. 55, 1137-38). However, the beginning date for the separate corporations began in 1955. The case of *Rogers v. Missouri Pacific Railroad Co.,* 352 U.S. 500, 506, was decided on February 25, 1957. Mr. Eastham's letter with reference to spreading liability which was referred to but not offered in evidence was dated December 7, 1961.

55. The Edwards companies have always carried insurance on cargo being transported and when damage thereto occurred, adjustments were always made directly by the insurance company with the cargo owner. (G. Exs. 9 & 10, Pars. 2(O)). Insurance for personal injury and property damage was carried in some instances but because of the cost, some of the companies carried no such insurance. The following tabulation reflects by year all of the personal injury and property damage claims paid by all of the various companies respecting the Edwards vessels for personal injury and property damage:

	Fiscal Year Ending During 1958	1959	1960
Edwards Transportation Co.	$38,907	$12,119	$44,271
Barge Transport Co.	3,180	7,414	5,371
Bay Sound Transportation Co.	....	....	40
Christine Towing Co.	10	1,519	1,077
Dixon Bay Transportation Co.	....	....	14
Green Bay Transportation Co.	....	....	364
Murray Bay Transportation Co.	....	....	702
Riverside Transportation Co.	....	294	16,433
Wilkins Barge Line	1,500	....	1,573
Louisiana Transportation Co.	29,540	24,627	16,843
Sterling Barge Line	286	250	25

(G. Exs. 9 & 10, Pars. 2(O); P. Ex. 4, pp. 11-14).

56. Over the years all of the companies and vessels have had claims for property damage and personal injury made against them. Some of the claims, of course, were valid and some spurious. Most claims were made with respect to operation of boats, not barges. The experience of the Edwards Transportation Co. partnership is typical; through 30 years of operation. The following are claims (whether or not valid) made with respect to barges:

Barge	Total Amount of Claims
Brazos	None
Dove	None
C. Milby	None
Curtis, Jr.	$ 2,500
George E.	5,200
Helen Mc	10,000
Hiram King	None
L. G. Cobb	None
Peggy Coyle	49,000
Perot	None
Petroleum	88,394
Salvador	None
San Jacinto	None
Trinity	None
W. J. Wyatt	None

(G. Exs. 9 & 10, Pars. 2(O); P. Ex. 4, pp. 7 & 9). The experience as to claims made (whether or not valid), against the other barge-owning organizations in the Edwards fleet is as follows:

Company	Total Amount of Claims—Inception to Date of Trial
Superior Barge Co.	$2,500
Buffalo Bayou partnership (2 barges)	2,500
Barge Transport Co. (5 barges)	2,500*
Barge Delta Joint Venture	None
Gulf Storage Co.	None
Coastal Transportation Co.	None
Ev Barge Co.	None
Jack Barge Co.	None
Naptha Barge Co.	None
Navidad Barge Co.	None
Wolverine Barge Co.	None
Michigan Barge Co.	None
Erie Barge Co.	None
Huron Barge Co.	None
Ontario Barge Co.	None
St. Clair Barge Co.	None
Lavaca Barge Co.	None

* 1950 to date of trial in 1966.

As to the organization expense issue:

57. Incident to the formation of 14 of the 20 new corporations (between 1955 and 1960), fees were paid to Edwards Transportation Co.'s attorneys covering fees and costs incident to preparing and filing the various corporations' articles of incorporation and holding the first meeting of shareholders. These organizational costs were all paid to the same law firm in amounts as follows:

Name of Corporation	Amount Paid	Reference in the Record of Trial
Bay Sound Transportation Co.	$262.92	G. Exs. 7 & 8, pars. 45
Riverside Transportation Co.	262.92	" " " " " " 47
Dixon Bay Transportation Co.	266.81	" " " " " " 51
Murray Bay Transportation Co.	266.81	" " " " " " 53
Green Bay Transportation Co.	272.28	" " " " " " 55
Lavaca Barge Co.	266.57	" " " " " " 57
Naptha Barge Co.	318.52	" " " " " " 59
Navidad Barge Co.	266.57	" " " " " " 61
Michigan Barge Co.	265.79	" " " " " " 64
Erie Barge Co.	266.54	" " " " " " 66
Huron Barge Co.	266.54	" " " " " " 68
Superior Barge Co.	265.79	" " " " " " 70
Ontario Barge Co.	266.67	" " " " " " 72
St. Clair Barge Co.	266.77	" " " " " " 74

58. On the first income tax return filed by the fourteen corporations mentioned in the preceding paragraph, no reference was made to the fact that the amounts paid were organizational costs. Neither on nor attached to the returns were there statements to the effect that the fourteen corporations elected to amortize the organizational costs. (P. Exs. 8). The amounts mentioned in the preceding paragraph were deducted along with other amounts by each of the fourteen corporations on their respective first income tax returns under the classification "Legal and Professional fees." (*Ibid.*)

As to the travel and entertainment expense issue:

59. During 1958, plaintiff Charles Edwards, at a downtown Houston hotel, cashed thirty-five $300 counter checks drawn on his personal bank. These checks were cashed regularly about every ten days or two weeks. Of the aggregate currency received ($10,500) Mr. Edwards contends that he redeposited $1,000. (Ex. K-1 to P. Ex. 5).

60. During 1959, plaintiff Charles Edwards (at the same downtown Houston hotel) cashed forty $300 counter checks drawn on his personal bank account, one $300 counter check in New Iberia, Louisiana, and one $800 counter check at the downtown Houston hotel. These checks were cashed regularly every week to ten days throughout the year. (Ex. K-2 to P. Ex. 5).

61. Neither Mr. Charles Edwards nor any other person maintained any records whatsoever to substantiate whether the $9,500 in 1958 (Par. 59, *supra.*) or the $13,100 in 1959 (Par. 60, *supra.*) were expended for travel and/or entertainment. (G. Ex. 18 (Edwards subpoena, item 1; Tr. 327, 329-31)).

As to the government bond interest issue:

62. During December 1946, the plaintiff Keith S. Edwards purchased six United States Savings Bonds, Series F, at a cost of $7,400 each, or a total of $44,400; these bonds had maturity values of $10,000 each, or an aggregate maturity value of $60,000 when they matured. (G. Exs. 7 & 8, Pars. 80.)

63. Plaintiff Keith S. Edwards during January 1947, purchased six additional Series F United States Savings Bonds, three at a cost of $7,400 each, and three at a cost of $740 each, or a total cost of $24,420. These bonds had maturity values of respectively three at $10,000 and three at $1,000, or a total of $33,000. (G. Exs. 7 & 8, Pars. 81.)

64. The bonds described in the second preceding paragraph, purchased during December 1946, matured during December 1958, and the bonds mentioned in the preceding paragraph, purchased during January 1947, matured during January of 1959. The United States had not extended the maturity date on the Series F Bonds described in this paragraph, and the maturity values thereof were payable when and as the bonds matured, and would have been paid to plaintiff Keith Edwards had he presented them for payment. (G. Exs. 7 & 8, Pars. 82.)

65. Some time during 1964, plaintiff Keith Edwards presented all of the Series F Bonds and collected the aggregate maturity value of $93,000. (G. Exs. 7 & 8, Pars. 82.)

66. The Commissioner of Internal Revenue caused the various tax returns of all plaintiffs involved in this suit to be examined and as a result of such examination, additional assessments were made, paid, and in due course

after claims for refund were filed, these suits demanding refunds were filed. Because the plaintiff Keith Edwards has conceded that the government is correct as to this additional assessment, no further discussion or reference to this part of the case need be further mentioned.

Discussion and Decisions

This Court has jurisdiction of the parties in the subject matter of this suit. Considering first the questions of admission of evidence that the Court had carried with the case, the rulings are as follows:

(1) As to the admissibility of the letter of John O'Farrell, dated July 15, 1965. The same is admitted upon authority of *Brooks v. Texas General Ind. Co.*, 251 F.2d 15 (C.C.A. 5th 1958). This letter was hearsay, not sworn to and the person writing it was not subjected to cross-examination and it was cumulative of other expert witness offered by the Plaintiffs. The weight to be given such testimony is, of course, up to the trier of facts. The Court in considering the latter is in accord with the following from the case of *Jones v. N. V. Nederlandsch-Amerikaansche Stoomvaart Maatshappij*, 374 F.2d 189, at 190, when the United States Court of Appeals for the Third Circuit held:

> ". . . For the opinion of an expert even if uncontradicted is not conclusive and a jury is not required to accept it. Such testimony must pass through the screen of the jury's judgment of credibility. *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, 627, 64 S.Ct. 724, 88 L.Ed. 967 (1944); *Rhoades, Incorporated v. United Air Lines, Inc.*, 340 F.2d 481 (3 Cir. 1965); *Wooley v. Great Atlantic & Pacific Tea Company*, 281 F.2d 78 (3 Cir. 1960)."

Passing now to the question of equitable estoppel claimed by Plaintiff as the result of a conversation between Plaintiff C. W. Edwards and government employees Walt Williams and Steven Condon. At most, this conversation was tentative and only applied to one vessel, to wit: *Letha C.*. The case of *Bornstein v. The United States* [65-1 USTC ¶ 9421], 345 F.2d 558 is in point and controlling. In that case at page 562, the Court of Claims wrote as follows:

> (2) ". . . It is a settled principle of law that the United States is not bound by the unauthorized acts of its agents, that it is not estopped to assert the lack of authority as a defense, and that persons dealing with an agent of the government must take notice of the limitations of his authority. *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947); *Utah Power & Light Co. v. United States,* 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791 (1917); *Byrne Organization, Inc. v. United States,* 287 F.2d 582, 152 Ct.Cl. 578 (1961). An agent cloaked only with apparent authority cannot bind the United States for, as the court stated in *United States v. Willis,* 164 F.2d 453, 455 (4th Cir. 1947)—
>
> '* * * He who deals with an agent of the government must look to his authority, which will not be presumed but must be established. He cannot rely upon the scope of dealing or apparent authority as in the case of a private agent'."

All other motions not heretofore specifically ruled on are hereby denied and overruled.

Depreciation Issue

Coming now to the first question for decision—that of the matter of the depreciation of the tugs and barges.

Plaintiffs claim that both the tugs and the barges have a useful life of only 7 years and that at the end of that 7 year period, they have no salvage value. Defendant asserts that the tugs have a useful life of 35 years with a 10% salvage value and the barges have a useful life of 25 years, and a 10% salvage value at the end of that 25 year period. A large amount of the more than 1,800 pages of testimony was devoted to this question of depreciation. The question of the regulation of the depreciation is covered in the Appendix A attached to this Opinion. Judge Connally in the recent case of *Shell Pipe Line Corporation v. United States,* 267 F.Supp. 1014, at 1018, correctly discusses depreciation, and in doing so sets forth the factors to be considered in making the determination. He wrote as follows:

> "* * * A reasonable allowance for the exhaustion, wear, tear and obsolescence of the property used by the taxpayer in his trade or business for the production of income shall be allowed. The allowance is that amount which should be set aside for the year in question with a reasonably consistent plan whereby the aggregate of the amounts set aside, plus the salvage value, will at the end of the estimated useful life of the depreciable property equal the cost or other basis thereof. The estimated useful life of an asset is not necessarily the actual life, *but it is the period over which the asset may reasonably be expected to be useful in the taxpayer's trade or business. This period is determined by reference to the taxpayer's experience with similar property;* (Emphasis added.) and some of the factors to be considered are (a) wear and tear, decay and decline from natural causes, (b) the normal progress of the art, economic changes, inventions and current developments within the industry and the taxpayer's

trade or business (c) the taxpayer's policy as to repairs, renewals and replacements."

The Plaintff taxpayer has the burden of proof to establish by the clear preponderance of the evidence his claim. This he failed to do. However, I am of the Opinion considering the reasonable reliable material facts, the applicable law and the pertinent regulations that the reasonable, proper and just allowance for depreciation in this case is as follows:

I find that the useful life of the tugs Athos, Porthos, Aramis and D'Artagnan is 15 years with a 10% salvage value at the end of such 15-year period; the balance of the tugs I hold have a useful life of 20 years with a 10% salvage value at the end of such 20-year period.

All of the barges involved in this case I conclude have a useful life of 15 years.

Multiple Corporation Issue

Turning now to the question of separate or multiple corporations. The question is whether the main or major purpose of the Plaintiffs in incorporating a large number of vessels, 20 of them involving only one vessel, was to avoid the payment of surtaxes. The Plaintiffs strenuously assert that spreading liability was the main reason for the many separate corporations, with other purposes for being in a preferable position in the event that they had labor trouble and also it would be much easier to transfer the stock in a corporation if such was necessary by reason of sales or inheritance, and too, they claimed that it was the banker's wish that separate corporations be formed.

The separate corporations resulted in a savings of about $110,000.00 per year. Mr. Edwards was extremely un-

happy over the large amount that he had to pay of his personal income tax. He was resentful of that fact. At the time that he began formation of separate corporations, it was before the Rogers case, *supra*. As to whether the main or major purpose and reason for the separate corporations was for tax savings or some other reason or reasons is purely a question of fact. In the case of *Bonneville Locks v. United States of America* [65-1 USTC ¶ 9330], 343 F.2d 790, at 791, the United States Court of Appeals for the Ninth Circuit, on March 23, 1965, held:

> "* * * A determination of what is the principal purpose of the acquisition of a corporation is a question of fact. *Kessmar Constr. Co. v. Commissioner* [64-2 USTC ¶ 9741], 336 F.2d 865 (9th Cir. 1964); *Shaw Constr. Co. v. Commissioner* [64-1 USTC ¶9101], 323 F.2d 316 (9th Cir. 1963); *Hawaiian Trust Co. v. United States* [61-1 USTC ¶ 9481], 291 F.2d 761 (9th Cir. 1961)."

Kessmar Construction Co. v. Commissioner of Internal Revenue, supra, was a case in which sixteen corporations had the same shareholders, and the tax court held that the principal purpose of the stockholders in forming these sixteen corporations instead of one was in evasion or avoidance of tax through the securing of tax benefits which the stockholders would otherwise not have enjoyed. The burden of proof that the Commissioner was in error was upon the Plaintiffs and they have not carried their burden. In the case of *Hiawatha Home Builders, Inc. v. Commissioner of Internal Revenue* [CCH Dec. 24884], 36 Tax Court of United States Reports, at 498, the court held:

> "* * * The second issue is whether the petitioner has established 'by the clear preponderance of the

evidence' that a major purpose of the transfer mentioned and described in the first issue, *supra,* was not to secure the surtax exemption or the minimum excess profits credit. The issue is *one of fact,* to be determined upon a consideration of all the circumstances relevant to the transfer. *Truck Terminals, Inc.* [CCH Dec. 24,044], 33 T. C. 876, 884; *Sno-Frost, Inc.* [CCH Dec. 23,474], 31 T. C. 1058, 1062, *acq.* 1959-2 *C. B.* 7; Income Tax Regs., Sec. 1.1551-1 (e). (Emphasis added.)

The interdicted purpose of securing the surtax exemption need not be the sole or principal purpose of the transfer of property. Rather, the benefit of the exemption is to be disallowed if such purpose was a major purpose. *Truck Terminals, Inc., supra.* Nor will a mere showing of a business need as actuating the transfer suffice to satisfy a taxpayer's burden of proof under section 1551. In a word, the taxpayer has the burden of establishing a negative proposition, *i.e.,* that the securing of the surtax exemption or the minimum excess profits credit was not a major purpose of the transfer."

The history and listing of the claims against the corporations and partnerships and their respective vessels for the years herein involved are significant when compared with the amount sought to be saved by the taxpayers. See: Paragraphs 55 and 56 on pages 42 and 43 of this Memorandum Opinion.

Plaintiffs have the heavy burden under the settled law of proving that the organizing of the 21 corporations was not for the purpose of securing surtax exemptions. If *one* purpose was to obtain such surtax exemption, then Plaintiffs have failed to discharge their burden. On this question of tax avoidance I hold against the Plaintiffs and in favor of the Government.

Amortization

Coming now to the question of whether the corporate Plaintiffs are not entitled to amortize their organizational expenditures. Several of the corporations[9] expended funds for legal costs in connection with their organization.[10] On the federal tax returns filed by each of the corporations they deducted the full amount of the organizational costs as "legal and professional fees" treating them as deductible under Section 162.

The Government takes the position that none of these amounts are deductible as legal and professional fees, *i.e.*, under Section 162 as ordinary and necessary business expenses. Taxpayers now agree that Section 162 is inapplicable. Both parties agree that if they are deductible at all, such expenditures are deductible only under Section 248[11] of the Internal Revenue Code, Appendix A, Page 2, *infra.*

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[9] The names of the corporations involved in this issue are set out in Footnote 3, *supra.*

[10] The amounts expended are set out in Statement, *supra,* Pars. 57 & 58.

[11] Section 248 was enacted in the 1954 Internal Revenue Code to provide a benefit to taxpayers; there was no corresponding provision in prior internal revenue law. Under the law prior to 1954, organizational costs were required to be capitalized and no deduction was ever allowed therefor on the theory that the corporation had an indefinite life, or if it had a definite life, it was subject to renewal an indefinite number of times. The organizational costs were deductible only when the corporation was terminated and its franchise abandoned. *Malta Temple Association v. Commissioner* [CCH Dec. 5133], 16 B. T. A. 409 (1929); *Shellabarger Grain Products Co. v. Commissioner* [44-2 USTC ¶ 9527], 146 F.2d 177 (C. A. 7th, 1944); *Koppers Co. v. United States* [60-2 USTC ¶ 9505], 278 F.2d 946 (Ct. Cl. 1960).

The Government takes the position that Section 248 requires an *express* election and failure to make the election in the form and manner proscribed, precludes applicability of Section 248. (Emphasis added.)

With respect to the time for the scope of the election required by Section 248, Section 248(c), Appendix A, *infra*, Page 3 provides in part as follows:

> "The election provided by subsection (a) may be made for *any taxable year* beginning after December 31, 1953, but *only* if made not later than the time prescribed by law for filing extensions thereof)." (Emphasis added.)

For Regulations pertinent to the time and manner of making an election see (Section 1.248-1(c)), Appendix A, Page 8, infra.

All of the plaintiffs admittedly failed to comply with Section 248 and the foregoing regulation. They made no reference in any way to an election to avail themselves of Section 248. The Regulations under Section 248 are obviously valid, because they are reasonable, consistent with the statute, and clearly with the Congressional grant of power. See, *e.g.*, *Ackerman v. United States* [63-2 USTC ¶ 9542], 318 F.2d 402, 404 (C.A. 10th); *Darby v. Wiseman* [63-2 USTC ¶ 12,186], 323 F.2d 792 (C.A. 10th, 1960).

The doctrine of election applies where, as here, a taxpayer is given a choice of either taking one or two courses of action; once there has been a clear exercise of the choice as shown by some act or failure to act, the election is binding on the taxpayer. An oversight, an error of

judgment, or unawareness of tax consequences does not lessen the binding character of the election. See Mertens, Federal Income Taxation, Sections 60.19-60.20 (1959); *Ross v. Commissioner* [48-2 USTC ¶ 9341], 169 F.2d 483, 493 (C.A. 1st 1948); *Alabama Pipe Co. v. Commissioner* [CCH Dec. 20,619], 23 T.C. 95, 98 (1954); *Thorrez v. Commissioner* [CCH Dec. 23,301], 31 T.C. 655, 668 (1958) *aff'd* [60-1 USTC ¶ 11,920], 272 F.2d 945 (C.A. 6th).

The corporate Plaintiffs in the instant case made binding elections *not to claim* the benefits of Section 248 by not complying with the statute and Regulations. Their organizational expenses, therefore, fall under the general rule; they must be capitalized and recovered upon ultimate abandonment of the corporate franchises.[12]

Travel and Entertainment Expenses

Reaching the last question to be decided on the merits, to wit: That of the alleged travel and entertainment expenses claimed by Mr. Charles W. Edwards.

In the case of *W. Horace Williams, Sr.*, and *Viola Bloch Williams v. United States of America*, United States Court of Appeals, Fifth Circuit, June 18, 1957, [57-2 USTC ¶ 9759] 245 F.2d 559, at 560, now Chief Judge John R. Brown, in a case in which a taxpayer sought a refund for income tax for entertainment expenses, wrote:

> "* * * That the trier, whether District Court or Tax Court, might have considerable latitude in making estimates of amounts probably spent in the light of accepted practice amongst law-abiding business-

[12] See the preceding footnote.

> men of moral standing considering the nature and kind of records which might reasonably be kept for such expenditures, *Cohan v. Commissioner,* 2 Cir., [2 USTC ¶ 489] 39 F.2d 540, 543, certainly does not require that such latitude be employed. The District Court may not be compelled to guess, or estimate. It may not be compelled to estimate even though such an estimate, if made, might have been affirmed. For the basic requirement is that there be sufficient evidence to satisfy the trier that *at least* the amount allowed in the estimate was in fact spent or incurred for the stated purpose. Until the trier has that assurance from the record, relief to the taxpayer would be unguided largesse."

In the late case of *Herbert v. Commissioner of Internal Revenue* [67-1 USTC ¶ 9421], 377 F.2d 65, at 69, the court held:

> "* * * The general rule is that the burden of proof is on the Commissioner to establish that the taxpayer received income. However, the Commissioner's determination of a deficiency satisfies such burden since the determination made by the Commissioner is presumptively correct. The taxpayer then has the burden of overcoming this presumption by a preponderance of the evidence. *American Pipe and Steel Corp. v. Commissioner of Internal Revenue* [57-1 USTC ¶9590], 243 F.2d 125 (9th Cir.), cert. denied, 355 U.S. 906, 78 S.Ct. 333, 2 L.Ed.2d 261 (1957)."

In this case, the taxpayer C. W. Edwards signally failed to discharge his burden of proof by not having any record of such entertainment or travel expenses, and I therefore hold that he has failed reasonably to establish with sufficient certainty to entitle him to make any recovery of the amounts that he allegedly spent for such entertainment or travel expenses.

In line with the above facts and the applicable law, I find that the claimed expenses of Mr. C. W. Edwards in the amount of $22,600.00 are non-deductible personal expenses.

The above and foregoing shall constitute the Findings of Fact and Conclusions of Law herein.

The question of court costs is adjudicated as follows:

Two-thirds shall be paid by the Plaintiffs and one-third by the Defendant.

The Clerk will notify counsel.

Appendix A

Internal Revenue Code of 1954:

SEC. 11. TAX IMPOSED.

(a) *Corporations in General.*—A tax is hereby imposed for each taxable year on the taxable income of every corporation. The tax shall consist of a normal tax computed under subsection (b) and a surtax computed under subsection (c).

(b) *Normal Tax.*—

(1) Taxable years beginning before July 1, 1964.—In the case of a taxable year beginning before July 1, 1964, the normal tax is equal to 30 percent of the taxable income.

(2) *Taxable years beginning after June 30, 1964.*—In the case of a taxable year beginning after June 30, 1964, the normal tax is equal to 25 percent of the taxable income.

(c) *Surtax.*—The surtax is equal to 22 percent of the amount by which the taxable income (computed without regard to the deduction, if any, provided in section 242 for partially tax-exempt interest) exceeds $25,000.

(26 U.S.C. 1958 ed., Sec. 11.)

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, * * *

* * *

(26 U.S.C. 1958 ed., Sec. 61.)

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

* * *

(26 U.S.C. 1958 ed., Sec. 61.)

SEC. 167. DEPRECIATION.

(a) *General Rule.*—There shall be allowed as a depreciation deduction a reasonable allowance for the ex-

haustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

(b) *Use of Certain Methods and Rates.*—For taxable years ending after December 31, 1953, the term "reasonable allowance" as used in subsection (a) shall include (but shall not be limited to) an allowance computed in accordance with regulations prescribed by the Secretary or his delegate, under any of the following methods:

(1) the straight line method,

(2) the declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (1),

(3) the sum of the years-digit method, and

(4) any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the taxpayer's use of the property and including the taxable year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used had such allowances been computed under the method described in paragraph (2).

Nothing in this subsection shall be construed to limit or reduce an allowance otherwise allowable under subsection (a).

(c) *Limitations on Use of Certain Methods and Rates.*—Paragraphs (2), (3), and (4) of subsection (b) shall

apply only in the case of property (other than intangible property) described in subsection (a) with a useful life of 3 years or more—

(1) the construction, reconstruction, or erection of which is completed after December 31, 1953, and then only to that portion of the basis which is properly attributable to such construction, reconstruction, or erection after December 31, 1953, or

(2) acquired after December 31, 1953, if the original use of such property commences with the taxpayer and commences after such date.

* * *

(26 U.S.C. 1958 ed., Sec. 167.)

SEC. 248. ORGANIZATIONAL EXPENDITURES.

(a) *Election to Amortize.*—The organizational expenditures of a corporation may, at the election of the corporation (made in accordance with regulations prescribed by the Secretary or his delegate), be treated as deferred expenses. In computing taxable income, such deferred expenses shall be allowed as a deduction ratably over such period of not less than 60 months as may be selected by the corporation (beginning with the month in which the corporation begins business).

(b) *Organizational Expenditures Defined.*—The term "organizational expenditures" means any expenditure which—

(1) is incident to the creation of the corporation;

(2) is chargeable to capital account; and

(3) is of a character which, if expended incident to the creation of a corporation having a limited life, would be amortizable over such life.

(c) *Time for and Scope of Election.*—The election provided by Subsection (a) may be made for any taxable year beginning after December 31, 1953, but only if made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof). The period so elected shall be adhered to in computing the taxable income of the corporation for the taxable year for which the election is made and all subsequent taxable years. The election shall apply only with respect to expenditures paid or incurred on or after the date of enactment of this title.

(26 U.S.C. 1958 ed., Sec. 248.)

SEC. 269. ACQUISITIONS MADE TO EVADE OR AVOID INCOME TAX.

(a) *In General.*—If—

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation, or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation.

and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by

securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then the Secretary or his delegate may disallow such deduction, credit, or other allowance. For purposes of paragraphs (1) and (2), control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation.

(b) *Power of Secretary or His Delegate to Allow Deduction, etc., in Part.*—In any case to which subsection (a) applies the Secretary or his delegate is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

* * *

(26 U.S.C. 1958 ed., Sec. 269.)

SEC. 451. GENERAL RULE FOR TAXABLE YEAR OF INCLUSION.

(a) *General Rule.*—The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period.

(26 U.S.C. 1958 ed., Sec. 451.)

SEC. 482. ALLOCATION OF INCOME AND DEDUCTIONS AMONG TAXPAYERS.

In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary or his delegate may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.

(26 U.S.C. 1958 ed., Sec. 482.)

SEC. 544. RULES FOR DETERMINING STOCK OWNERSHIP.

(a) *Constructive Ownership.*—For purposes of determining whether a corporation is a personal holding company, insofar as such determination is based on stock ownership under section 542 (a)(2), section 543 (a)(5), or section 543(a)(6)—

(1) *Stock not owned by individual.*—Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries.

(2) *Family and partnership ownership.*—An individual shall be considered as owning the stock owned, directly or indirectly, by or for his family or by or for his partner. For purposes of this paragraph, the family of an individual includes only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

(3) *Options.*—If any person has an option to acquire stock, such stock shall be considered as owned by such person. For purposes of this paragraph, an option to acquire such an option, and each one of a series of such options, shall be considered as an option to acquire such stock.

(4) *Application of family-partnership and option rules.*—Paragraphs (2) and (3) shall be applied—

(A) For purposes of the stock ownership requirement provided in section 542 (a)(2), if, but only if, the effect is to make the corporation a personal holding company;

(B) for purposes of section 543(a)(5) (relating to personal service contracts), or of section 543(a)(6) (relating to the use of property by shareholders), if, but only if, the effect is to make the amounts therein referred to includible under such paragraph as personal holding company income.

(5) *Constructive ownership as actual ownership.*—Stock constructively owned by a person by reason of the

application of paragraph (1) or (3) shall, for purposes of applying paragraph (1) or (2), be treated as actually owned by such person; but stock constructively owned by an individual by reason of the application of paragraph (2) shall not be treated as owned by him for purposes of again applying such paragraph in order to make another the constructive owner of such stock.

(6) *Option rule in lieu of family and partnership rules.* —If stock may be considered as owned by an individual under either paragraph (2) or (3) it shall be considered as owned by him under paragraph (3).

* * *

(26 U.S.C. 1958 ed., Sec. 544.)

SEC. 1551. DISALLOWANCE OF SURTAX EXEMPTION AND ACCUMULATED EARNINGS CREDIT.

If any corporation transfers, on or after January 1, 1951, all or part of its property (other than money) to another corporation which was created for the purpose of acquiring such property or which was not actively engaged in business at the time of such acquisition, and if after such transfer the transferor corporation or its stockholders, or both, are in control of such transferee corporation during any part of the taxable year of such transferee corporation, then such transferee corporation shall not for such taxable year (except as may be otherwise determined under section 269(b)) be allowed either the $25,000 exemption from surtax provided in section 11(c) or the $60,000 accumulated earnings credit provided in paragraph (2) or (3) of section 535(c), unless such transferee corporation shall establish by the clear pre-

ponderance of the evidence that the securing of such exemption or credit was not a major purpose of such transfer. For purposes of this section, control means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of the corporation. In determining the ownership of stock for the purpose of this section, the ownership of stock shall be determined in accordance with the provisions of section 544, except that constructive ownership under section 544(a)(2) shall be determined only with respect to the individual's spouse and minor children. The provisions of section 269(b), and the authority of the Secretary under such section, shall, to the extent not inconsistent with the provisions of this section, be applicable to this section. (26 U.S.C. 1958 ed., Sec. 1551.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.167(a)-1. *Depreciation in general.*—(a) *Reasonable allowance.* Section 167 (a) provides that a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business or of property held by the taxpayer for the production of income shall be allowed as a depreciation deduction. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property as provided in section 167(g) and § 1.167(g)-1. An asset shall not be depreciated below a reasonable

salvage value under any method of computing depreciation. However, see section 167(f) and § 1.167(f)-1 for rules which permit a reduction in the amount of salvage value to be taken into account for certain personal property acquired after October 16, 1962. See also paragraph (c) of this section for definition of salvage. The allowance shall not reflect amounts representing a mere reduction in market value. See section 179 and § 1.179-1 for a further description of the term "reasonable allowance."

(b) *Useful life.* For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probably future developments. Some of the factors to be considered in determining this period are (1) wear and tear and decay or decline from natural causes, (2) the normal progress of the art, economic changes, inventions, and current developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's trade or business, and (4) the taxpayer's policy as to repairs, renewals, and replacements. Salvage value is not a factor for the purpose of determining useful life. If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination. The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary

regardless of the method of computing depreciation. However, estimated remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination. For rules covering agreements with respect to useful life, see section 167(d) and § 1.167(d)-1.

(c) *Salvage.* (1) Salvage value is the amount (determined at the time of acquisition) which is estimated will be realizable upon or other disposition of an asset when it is no longer useful in the taxpayer's trade or business or in the production of his income and is to be retired from service by the taxpayer. Salvage value shall not be changed at any time after the determination made at the time of acquisition merely because of changes in price levels. However, if there is a redetermination of useful life under the rules of paragraph (b) of this section, salvage value may be redetermined based upon facts known at the time of such redetermination of useful life. Salvage, when reduced by the cost of removal, is referred to as net salvage. The time at which an asset is retired from service may vary according to the policy of the taxpayer. If the taxpayer's policy is to dispose of assets which are still in good operating condition, the salvage value may represent a relatively large proportion of the original basis of the asset. However, if the taxpayer customarily uses an asset until its inherent useful life has been substantially exhausted, salvage value may represent no more than junk value. Salvage value must be taken into account in determining the depreciation deduction either by a reduction of the amount subject to depreciation or by a reduction in the rate of depreciation, but in no event shall an asset (or an account) be depreciated below a reasonable salvage value. See, however, paragraph

(a) of § 1.167(b)-2 for the treatment of salvage under the declining balance method, and § 1.179-1 for the treatment of salvage in computing the additional first-year depreciation allowance. The taxpayer may use either salvage or net salvage in determining depreciation allowances but such practice must be consistently followed and the treatment of the costs of removal must be consistent with the practice adopted. For specific treatment of salvage value, see §§ 1.167(b)-1, 1.167(b)-2, and 1.167(b)-3. When an asset is retired or disposed of, appropriate adjustments shall be made in the asset and depreciation reserve accounts. For example, the amount of the salvage adjusted for the costs of removal may be credited to the depreciation reserve.

* * *

(26 C.F.R., Sec. 1.167(a)-1.)

Sec. 1.248-1. *Election to amortize organizational expenditures.*—(a) *In general.* (1) Section 248(a) provides that a corporation may elect for any taxable year beginning after December 31, 1953, to treat its organizational expenditures, as defined in subsection (b) of section 248 and in paragraph (b) of this section, as deferred expenses. A corporation which exercises such election must, at the time it makes the election, select a period of not less than 60 months, beginning with the month in which it began business, over which it will amortize its organizational expenditures. The period selected by the corporation may be equal to or greater, but not less, than 60 months, but in any event it must begin with the month in which the corporation began business. The organizational expenditures of the corporation which are treated as deferred ex-

penses under the provisions of section 248 and this section shall then be allowed as a deduction in computing taxable income ratably over the period selected by the taxpayer. The period selected by the taxpayer in making its election may not be subsequently changed but shall be adhered to in computing taxable income for the taxable year for which the election is made and all subsequent taxable years.

(2) If a corporation exercises the election provided in section 248(a), such election shall apply to all of its expenditures which are organizational expenditures within the meaning of subsection (b) of section 248 and paragraph (b) of this section. The election shall apply, however, only with respect to expenditures incurred before the end of the taxable year in which the corporation begins business (without regard to whether the corporation files its returns on the accrual or cash method of accounting or whether the expenditures are paid in the taxable year in which they are incurred), if such expenditures are paid or incurred on or after August 16, 1954 (the date of enactment of the Internal Revenue Code of 1954).

(3) The deduction allowed under section 248 must be spread over a period beginning with the month in which the corporation begins business. The determination of the date the corporation begins business presents a question of fact which must be determined in each case in light of all the circumstances of the particular case. The words "begins business," however, do not have the same meaning as "in existence." Ordinarily, a corporation begins business when it starts the business operations for which it was organized; a corporation comes into existence on the date of its incorporation. Mere organizational

activities, such as the obtaining of the corporate charter, are not alone sufficient to show the beginning of business. If the activities of the corporation have advanced to the extent necessary to establish the nature of its business operations, however, it will be deemed to have begun business. For example, the acquisition of operating assets which are necessary to the type of business contemplated may constitute the beginning of business.

* * *

(c) *Time and manner of making election.* The election provided by section 248(a) and paragraph (a) of this section shall be made in a statement attached to the taxpayer's return for the taxable year in which it begins business. Such taxable year must be one which begins after December 31, 1953. The return and statement must be filed not later than the date prescribed by law for filing the return (including any extensions of time) for the taxable year in which the taxpayer begins business. The statement shall set forth the description and amount of the expenditures involved, the date such expenditures were incurred, the month in which the corporation began business, and the number of months (not less than 60 and beginning with the month in which the taxpayer began business) over which such expenditures are to be deducted ratably.

(26 C.F.R., Sec. 1.248-1.)

Sec. 1.451-2. *Constructive receipt of income.* — (1) *General rule.* Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so

that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions. Thus, if a corporation credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt. In the case of interest, dividends, or other earnings (whether or not credited) payable in respect of any deposit or account in a bank, building and loan association, savings and loan association, or similar institution, the following are not substantial limitations or restrictions on the taxpayer's control over the receipt of such earnings:

(1) A requirement that the deposit or account, and the earnings thereon, must be withdrawn in multiples of even amounts;

(2) The fact that the taxpayer would, by not withdrawing the earnings until a later date, receive a higher rate of earnings than would be payable if the earnings are withdrawn during the taxable year;

(3) A requirement that the earnings may be withdrawn only upon a withdrawal of all or part of the deposit or account. However, the mere fact that such institutions may pay earnings on withdrawals, total or partial, made during the last three business days of any calendar month ending a regular quarterly or semiannual earnings period at the applicable rate calculated to the end of such calendar month shall not constitute constructive receipt of income by any depositor or account holder

in any such institution who has not made a withdrawal during such period;

(4) A requirement that a notice of intention to withdraw must be given in advance of the withdrawal. In any case when the rate of earnings payable in respect of such a deposit or account depends on the amount of notice of intention to withdraw that is given, earnings at the maximum rate are constructively received during the taxable year regardless of how long the deposit or account was held during the year or whether, in fact, any notice of intention to withdraw is given during the year. However, if in the taxable year of withdrawal the depositor or account holder receives a lower rate of earnings because he failed to give the required notice of intention to withdraw, he shall be allowed an ordinary loss in such taxable year in an amount equal to the difference between the amount of earnings previously included in gross income and the amount of earnings actually received. See section 165 and the regulations thereunder.

* * *

(26 C.F.R., Sec. 1.1451-2.)

Sec. 1.1551-1. *Disallowance of surtax exemption and accumulated earnings credit.*—

* * *

(d) *Nature of transfer.* A transfer made by any corporation of all or part of its assets, whether or not such transfer qualifies as a reorganization under section 368 is within the scope of section 1551 except that section 1551 does not apply to a transfer of money only. For example, the transfer of cash for the purpose of expanding

the business of the transferor corporation through the formation of a new corporation is not a transfer within the scope of section 1551 irrespective of whether the new corporation uses the cash to purchase from the transferor corporation stock in trade or similar property.

(e) *Purpose of transfer.* In determining, for the purpose of section 1551, whether the securing of the exemption from surtax or the accumulated earnings credit constituted "a major purpose" of the transfer, all circumstances relevant to the transfer shall be considered. For disallowance of the surtax exemption and accumulated earnings credit under section 1551, it is not necessary that the obtaining of either such credit or exemption or both have been the sole or principle purpose of the transfer of the property. It is sufficient if it appears, in the light of all the facts and circumstances, that the obtaining of such exemption or credit, or both, was one of the major considerations that prompted the transfer. Thus, the securing of the surtax exemption or the accumulated earnings credit may constitute "a major purpose" of the transfer, notwithstanding that such transfer was effected for a valid business purpose and qualified as a reorganization within the meaning of section 368. The taxpayer's burden of establishing by the clear preponderance of the evidence that the securing of either such exemption or credit or both was not "a major purpose" of the transfer may be met, for example, by a showing that the obtaining of such exemption, or credit, or both, was not a major factor in relationship to the other consideration or considerations which prompted the transfer.

(26 C.F.R., Sec. 1.1551-1.)

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 507

BAY SOUND TRANSPORTATION CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Add. 1-15)[1] is officially reported at 410 F. 2d 505. The opinion of the district court (Add. 19-96) is not officially reported.

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[1] "Add." references are to the separately bound "Addendum to Petition for Writ of Certiorari". "I-R.", "II-R.", etc., references are to the "Transcript of Record" in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1969 (Add. 16-17), and the petition for rehearing was denied on May 30, 1969 (Add. 18). The petition for a writ of certiorari was filed on August 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in remanding the case for findings as to whether the 20 corporate petitioners were formed for the principal purpose of tax avoidance so that the tax advantages usually available to multiple corporations should be denied under Section 269 of the Internal Revenue Code of 1954.

2. Whether the determination of the district court, affirmed by the court of appeals, of useful lives for petitioners' tugboats and barges for depreciation purposes is supported by the record.

STATUTES AND REGULATIONS INVOLVED

The pertinent parts of Sections 11, 167, 269 and 1551 of the Internal Revenue Code of 1954, and of Treasury Regulations on Income Tax (1954 Code), Section 1.167(a)-1, are set forth in the Appendix, *infra*, pp. 8-14.

STATEMENT

I

Petitioners, 20 corporations and six non-corporate taxpayers are engaged in the transportation of crude

oil and petroleum products (Add. 22, 30). The corporate petitioners are commonly controlled (Add. 45-53), and each of them was organized to acquire one tugboat or barge (Add. 53). Petitioners' vessels were operated as an integral part of a single fleet out of common offices by common personnel and without regard to their separate corporate ownerships other than for bookkeeping purposes (Add. 55-58).

Key personnel in petitioners' organization were aware of the tax advantages of spreading income from one business over several corporations, having been counseled regarding multiple surtax exemptions [2] by a taxation specialist of a national certified public accounting firm (Add. 58-59, 60). The key personnel also were counseled to limit potential tort liability through the use of multiple corporations (Add. 61-62).

The Commissioner disallowed the multiple surtax exemptions of the 20 corporations on the ground that the corporations were formed for "the principal purpose" of tax avoidance within the meaning of Section 269 of the Internal Revenue Code of 1954 (Add. 3-4). At trial, the government also contended that the multiple surtax exemptions should be disallowed under Section 1551 of the Code, on the ground that "a major purpose" of each corporation's acquisition of a single vessel was tax avoidance (I-R. 54).

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[2] Under Section 11 of the Internal Revenue Code of 1954, the first $25,000 of a corporation's taxable income is exempt from the corporate surtax and thus is subject to tax at a lower rate than taxable income in excess of $25,000. Under Section 535(c), an exemption from the accumulated earnings tax is allowed to each separate corporation.

The district court concluded, favorably to the government, that the corporate petitioners failed to establish that they were organized other than for the purpose of tax avoidance. Its opinion was unclear, however, as to whether the disallowance was under Section 269 or Section 1551. (Add. 72-74.)

The court of appeals held that the district court had disallowed the exemptions under Section 1551, and that such disallowance was erroneous in that there was insufficient proof that the vessels had been acquired by the corporate petitioners from a corporation, a requirement of Section 1551. On this issue the case was reversed and remanded for the district court to make findings on the question whether, under Section 269, "the principal purpose" for the formation of the corporate petitioners was tax avoidance. (Add. 12-15.)

II

Petitioners claimed depreciation on their tugboats and barges using a useful life of seven years and on the assumption that after seven years the vessels had no salvage value. The Commissioner maintained that petitioners' estimates were not "reasonable" as required by Section 167(a) of the Code. At trial and in amended answers the government contended that the tugs had a useful life of 35 years, the barges a useful life of 25 years and that salvage value of ten percent should be assigned to both types of vessels. (Add. 70-71.)

The district court found that four of the tugs had a useful life of 15 years, the remaining tugs a use-

ful life of 20 years and that a ten percent salvage should be assigned to all tugs. It concluded that the barges had a useful life of 15 years and did not find a salvage value for these vessels. (Add. 72). In determining the useful lives and salvage to be allowed, the court considered petitioners' experience with tugs and barges, conditions existing in the tax years involved and probable future developments, including technological developments, changes in design of the barges, areas and types of water in which the boats may operate, changes in types of cargo, deterioration in the maintenance of the boats and obsolescence (Add. 28-30, 33-34, 44). It heard testimony of expert witnesses whose opinions as to the appropriate useful lives ranged from six to 30 years (II-R. 503, 611; III-R. 806-807, 842-844, 944, 1116, 1147-1168).

On appeal, petitioners argued, *inter alia*, that the district court had given undue weight to petitioners' experience showing that few of its pre-1955 vessels had been retired from service and insufficient weight to a report prepared by Internal Revenue Service engineers that supported petitioners' position (Add. 5, 9). The court of appeals concluded, however, that the district court had considered significant factors other than petitioners' experience and that it was within the province of the trier of fact to weigh the Internal Revenue Service report together with other expert testimony (Add. 8-9). The Fifth Circuit affirmed the district court's findings as not clearly erroneous (Add. 11).

ARGUMENT

The decision below turns solely on an evaluation of the evidence. There is no conflict of decisions or other ground for further review.

1. The court of appeals correctly held with respect to the multiple corporations issue (Add. 14-15) that since the district court had not made findings on the question of "the principal purpose" for the acquisitions under Section 269, the case should be remanded to that court for appropriate findings. This is no more than is required under Rule 52(a) of the Federal Rules of Civil Procedure. Although petitioners seek certiorari on this issue, they suggest no reason for review by this Court and acknowledge that such review would be "premature" (Pet. 13).

2. Petitioners' arguments on the depreciation issue are similarly lacking in merit. In determining the useful lives of the tugs and barges, the district court was applying to a particular set of facts the established principle that depreciation is intended to be a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in a trade or business or for the production of income. See Treasury Regulations, Section 1.167(a)-1(b), Appendix, *infra*, pp. 13-14; *Massey Motors* v. *United States*, 364 U.S. 92; *Hertz Corp.* v. *United States*, 364 U.S. 122. The court of appeals' holding that the district court's findings are not clearly erroneous likewise was routine. The case thus comes within the settled principle that in the absence of extraordinary circumstances, this Court will not review facts

found by a trial court that are affirmed on appeal. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

Contrary to petitioners' assertions (Pet. 10, 13, 15), there is no conflict with *United States* v. *Ludey*, 274 U.S. 295, or *Burnet* v. *Niagara Falls Brewing Co.*, 282 U.S. 648. These authorities and "National Treasury Department Policy" (Pet. 11) require that a taxpayer's estimates of useful lives and salvage for depreciation purposes be reasonable and that such reasonableness be established by the preponderance of the evidence. Here it was held on the evidence that petitioners failed to make the requisite showing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1969.

APPENDIX

Internal Revenue Code of 1954:

SEC. 11. TAX IMPOSED.

(a) *Corporations in General.*—A tax is hereby imposed for each taxable year on the taxable income of every corporation. The tax shall consist of a normal tax computed under subsection (b) and a surtax computed under subsection (c).

(b) [as amended by Sec. 2, Tax Rate Extension Act of 1959, P.L. 86-75, 73 Stat. 157] *Normal Tax.*—

(1) *Taxable years beginning before July 1, 1960.*—In the case of a taxable year beginning before July 1, 1960, the normal tax is equal to 30 percent of the taxable income.

* * * *

(c) *Surtax.*—The surtax is equal to 22 percent of the amount by which the taxable income * * * exceeds $25,000.

* * * *

[26 U.S.C. (1958 ed.) 11.]

SEC. 167. DEPRECIATION.

(a) *General Rule.*—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

(b) *Use of Certain Methods and Rates.*—For taxable years ending after December 31, 1953, the term "reasonable allowance" as used in subsection (a) shall include (but shall not be limited to) an allowance computed in accordance with regulations prescribed by the Secretary or his delegate, under any of the following methods:

(1) the straight line method,

(2) the declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (1),

(3) the sum of the years-digits method, and

(4) any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the taxpayer's use of the property and including the taxable year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used had such allowances been computed under the method described in paragraph (2).

Nothing in this subsection shall be construed to limit or reduce an allowance otherwise allowable under subsection (a).

(c) *Limitations on Use of Certain Methods and Rates.*—Paragraphs (2), (3), and (4) of subsection (b) shall apply only in the case of property (other than intangible property) described in subsection (a) with a useful life of 3 years or more—

(1) the construction, reconstruction, or erection of which is completed after December 31, 1953, and then only to that portion of the basis which is properly attributable to such construction, reconstruction, or erection after December 31, 1953, or

(2) acquired after December 31, 1953, if the original use of such property commences with the taxpayer and commences after such date.

* * * * *

[26 U.S.C. 167.]

SEC. 269. ACQUISITIONS MADE TO EVADE OR AVOID INCOME TAX.

(a) *In General.*—If—

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation,

and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy,

then such deduction, credit, or other allowance shall not be allowed. For purposes of paragraphs (1) and (2), control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation.

(b) *Power of Secretary or His Delegate To Allow Deduction, etc., in Part.*—In any case to which subsection (a) applies the Secretary or his delegate is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

* * * * *

[26 U.S.C. (1958 ed.) 269.]

SEC. 1551 [as amended by Sec. 205, Small Business Tax Revision Act of 1958, P.L. 85-866, 72 Stat. 1606, 1676, 1680]. DISALLOWANCE OF SURTAX EXEMPTION AND ACCUMULATED EARNINGS CREDIT.

If any corporation transfers, on or after January 1, 1951, all or part of its property (other than money) to another corporation which was created for the purpose of acquiring such property or which was not actively engaged in business at the time of such acquisition, and if after such transfer the transferor corporation or its stockholders, or both, are in control of such transferee corporation during any part of the taxable year of such transferee corporation, then such transferee corporation shall not for such taxable year (except as may be otherwise determined under section 269(b)) be allowed either the $25,000 exemption from surtax provided in section 11(c) or the $100,000 accumulated earnings credit provided in paragraph (2) or (3) of section 535(c), unless such transferee corporation shall establish by the clear preponderance of the evidence that the securing of such exemption or credit was not a major purpose of such transfer. * * *

[26 U.S.C. (1958 ed.) 1551.]

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.167(a)-1. *Depreciation in general.*

(a) *Reasonable allowance.* Section 167(a) provides that a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business or of property held by the taxpayer for the produc-

tion of income shall be allowed as a depreciation deduction. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property as provided in section 167(g) and § 1.167(g)-1. An asset shall not be depreciated below a reasonable salvage value under any method of computing depreciation. However, see section 167(f) and § 1.167(f)-1 for rules which permit a reduction in the amount of salvage value to be taken into account for certain personal property acquired after October 16, 1962. See also paragraph (c) of this section for definition of salvage. The allowance shall not reflect amounts representing a mere reduction in market value. See section 179 and § 1.179-1 for a further description of the term "reasonable allowance."

(b) *Useful life.* For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probable future developments. Some of the factors to be considered in determining this period are (1) wear and tear and decay or decline from natural causes, (2) the normal progress of the art, economic changes, inventions, and current

developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's trade or business, and (4) the taxpayer's policy as to repairs, renewals, and replacements. Salvage value is not a factor for the purpose of determining useful life. If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination. The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary regardless of the method of computing depreciation. However, estimated remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination. For rules covering agreements with respect to useful life, see section 167(d) and § 1.167(d)-1.

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[26 C.F.R. 1.167(a)-1.]

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SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

BAY SOUND TRANSPORTATION CO., et al.

v.

UNITED STATES OF AMERICA

SUPREME COURT No. 507

PETITION FOR REHEARING, REQUESTING REMAND ONLY

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PETITION FOR REHEARING, REQUESTING REMAND ONLY

Introduction. This case already is remanded (by the Fifth Circuit) to the District Court on the "multiple corporations" issue. In this petition for rehearing we request only that the depreciation issue likewise be remanded.

We ask the Court to *remand* the depreciation issue to the District Court (or, alternatively, to the Fifth Circuit) because of intervening developments—and also because the case is already remanded to the District Court on the "multiple corporations" issue.

Our Petition for Certiorari did point out (p. 9) that the Government's and the District Court's reliance on "past history" contravenes IRS policy since 1962. More importantly for present purposes is the intervening opin-

ion of the Ninth Circuit in *Western Terminal Co. v. United States,* 412 F.2d 826, which was decided in May of this year, *after* the District Court's decision herein had been reviewed by the Fifth Circuit. As pointed out in our Petition for Certiorari (p. 8), the Ninth Circuit in *Western Terminal Co.* held—and even received a letter from Government counsel to such effect—that "hindsight" is irrelevant and, at least since 1954,[1] should not be considered (as it was here) in resolving depreciation controversies.

Now, the fact that much reliance was placed on "hindsight" (and "past history", too) in the courts below in the instant case suggests, in fairness, that this Court should *remand* the *depreciation* issue to the District Court.

Since the filing of our Petition for Certiorari (about August 23, 1969), there has been a particularly noteworthy development which reflects the latest and presumably the most enlightened thinking on the subject of depreciation. The consensus of the House, the Senate Finance Committee and the Treasury Department favors depreciation of railroad cars over a period of approximately five years. Following passage by the House of Representatives of the Tax Reform Bill of 1969 (H.R. 13270), in which seven-year amortization of railroad cars was approved, the Senate Finance Committee approved a five-year amortization plan suggested by the Treasury Department. The barge industry competes with the railroad industry, and railroad cars incontestably have a much longer life than the taxpayers' hulls (as our evidence

1. The Ninth Circuit and the Government correctly concluded that using "hindsight" is inconsistent with Treas. Reg. §1.167(b)-o-(a), which was promulgated under Sec. 167 of the 1954 Code and is therefore (under accepted law) effective as of 1954.

showed—but it would be obvious anyway). Yet, for years the Revenue Service has sanctioned depreciation of railroad cars over less than fifteen years,[2] and fifteen years is the minimum period for depreciation which the courts allowed the instant case.

We submit that this recent development flags the trend and compounds the inequity of requiring fifteen- and twenty-year depreciation for the hulls here involved.

In our Petition for Certiorari we naturally omitted several important considerations in the interest of brevity. In addition to omitting any mention of the railroad industry, we also omitted the following significant matters which we now ask the Court to consider:

(1) *The shrimp-boat industry.* In 1959 the Internal Revenue Service settled with the shrimp-boat industry on an industry-wide basis as a result of a study by the IRS Valuation Analysis Branch. They agreed to a 12-year depreciation span for the shrimp-boat hulls. The life of the shrimp-boat hulls is incontestably longer than that of the hulls of the vessels involved here. This point was established by the IRS Valuation Analysis Branch Report, item (7), p. 13 (Pltfs. Ex. 2), filed in this case.

(2) *The taxpayers' industry—the petroleum barge industry.* The Mazur Report filed in this case (covering 751 Gulf Coast area vessels) and the District Court's opinion in the *Tidewater* case (68-1 USTC ¶9405) show that the hulls of oil barges and tugboats, in the vast

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2. Rev. Proc. 62-21, 1962-2 Cum. Bull. 418, Part I, deals with railroad cars in two places. Under "Group Three: Guidelines for Manufacturers," item 22 approves a depreciation span of 12 years for railroad cars. "Group Four: Guidelines for Transportation [etc.]" approves a depreciation span of 14 years for railroad cars, under item 9(a) (Railroads—Machinery and equipment).

majority of cases industry-wide, are depreciated by their owners over periods of ten years or less—with Revenue Service approval, as evidenced by the District Court's opinion in *Tidewater*.

New Alternative Argument. We ask the Court to consider the following new, alternative argument: The law should not be (and we submit is not) that depreciation necessarily is unreasonable solely because it be taken over a period of time that is probably shorter than the actual period that a property will be in use. For the question is simply one of *reasonableness* (under the statute); and there are factors other than merely length of time which are to be considered in determining the reasonableness of any rate of depreciation.

Although this is a new argument in this lawsuit, it is sound in principle and finds support in the only article we have found dealing directly with the subject of reasonableness as the basis for depreciation, written 38 years ago. Rolnick, "Reasonableness, The Basis for Depreciation," 9 The Tax Magazine [Taxes] 95 (March 1931). There it is stated (p. 95):

> [T]he only rule * * * is that the annual deduction for depreciation must be "reasonable."

"[R]easonableness in practice is, often, merely rough agreement with the policy of others operating the same kinds of assets under more or less similar conditions." *Ibid.* (Note the discrimination against the taxpayers in the present case.)

The future is unpredictable and unforeseeable. A reasonable allowance for depreciation would require (in addition to allowing for obsolescence and wear and tear)

allowing for "inadequacy" due to unforeseeable "changed demands" of the market or to other causes. *Ibid.* Because it is based on what is reasonable, the law of depreciation permits "an allowance for future contingencies," even though not measurable at all. Rolnick, *supra,* pp. 95-96. The times are rapidly changing, and the future cannot be determined, reliably, on the basis of the past. Indeed, the chief error in determining the future life of an asset is doing so "on the basis of the ages of similar items still in use." *Id.* at 96. Therefore, reasonableness requires that a businessman be allowed a safety factor in determining his rate of depreciation; and "[E]stimates of probable life of a long-lived asset should lean heavily in favor of the taxpayer." *Ibid.* The concept of reasonableness thus is broader than a mere slavish adherence to the presently foreseeable duration of productive life.

Depreciation is much too important an issue to have received such little attention from the Court in the past several decades and particularly in this post-World War II era of proliferating technological development and rapid change.

CONCLUSION

This case already is remanded (by the Fifth Circuit) to the District Court on the "multiple corporations" issue. We respectfully ask the Court to remand the depreciation issue, also, to the District Court (or alternatively to the Fifth Circuit). Such court should be directed to consider, on remand, the Government's concession in the *Western Terminal Co.* case (May 29, 1969) that "hindsight" is irrelevant and should not be used (as it was here) in resolving depreciation controversies. The District Court

should be allowed to take into account the recent Congressional and Treasury actions which reflect national policy and presumably more enlightened thinking in approving amortization of railroad cars (which are undoubtedly longer-lived than the hulls in question) over a period of only 5 years.

These important developments occurred after the decisions of the courts below. We request merely that the case be remanded for consideration thereof, and such other matters as the Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds which are confined to intervening circumstances of substantial or controlling effect, and to other substantial grounds available to petitioners although not previously presented, in accordance with Supreme Court Rule 58, Paragraph 2.

JOHN A. BAILEY

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Rehearing have been served on the United States by air-mailing, with postage prepaid, on this the _____ day of December, 1969, the same to the following:

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